RECEIVED
FEB 4 9 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 79-912
79-914

IN THE
SUPREME COURT OF THE UNITED STATES
October, 1979

MARLIN JOHNSON, et al.,
Petitioners,

vs.

IBERIA HAMPTON, et al.,
Respondents.

EDWARD V. HANRAHAN, et al.,
Petitioners,

vs.

IBERIA HAMPTON, et al.,
Respondents.

BRIEF FOR RESPONDENTS ANDERSON, BELL, CLARK, SATCHEL, & TRUELUCK IN OPPOSITION TO DEFENDANTS' PETITIONS FOR WRITS OF CERTIORARI

G. Flint Taylor, Jr.
Dennis Cunningham
Charles Hoffman
Jeffrey H. Haas
Jonathan Moore
Attorneys for these Respondents
343 S. Dearborn St. -Rm 1607
Chicago, Illinois 60604
(312) 663-5046

TABLE OF CONTENTS

		Page
I.	STATEMENT OF THE CASE	1
II.	OPINION OF THE COURT BELOW	22
III.	REASONS TO DENY DEFENDANTS' PETITIONS	27
IV.	ARGUMENT	35
A.	THE CIRCUIT COURT BELOW CORRECTLY APPLIED THIS COURT'S HOLDING IN IMBLER V. PACHTMAN TO THE EVIDENCE ADDUCED AT TRIAL, FINDING THAT THE ACTIONS OF DEFENDANTS HANRAHAN AND JAVOLEC IN PLANNING AN UNCONSTITUTIONAL RAID, AND OBTAINING A FRAUDULENT WARRANT WAS AN INVESTIGATIVE RATHER THAN ADVOCACY FUNCTION. (St. Deft. Point III)	35
B.	THE CIRCUIT COURT CORRECTLY HELD THAT THE PLAINTIFFS PROVED A PRIMA FACIE CASE OF VIOLATION OF THEIR CONSTITUTIONAL RIGHTS BY THE DEFENDANTS' POST-RAID PUBLICITY CAMPAIGN; AND FURTHER THAT THIS CAMPAIGN WAS NOT PART OF A PROSECUTOR'S ADVOCACY FUNCTION. (S.D. Pt. X)	44
C.	THE DECISION OF THE CIRCUIT COURT DOES NOT CONFLICT WITH MONELL V. DEPARTMENT OF SOCIAL SERVICES OR WITH THE DECISIONS OF OTHER CIRCUITS BECAUSE IT IS BASED ON EVIDENCE OF DIRECT SUPERVISORY PARTICIPATION BY DEFENDANTS HANRAHAN AND JAVOLEC, RATHER THAN ON ANY THEORY OF VICARIOUS LIABILITY. (S.D. Pt. V)	47
D.	THE CIRCUIT COURT'S DECISION THAT CERTAIN POLICE DEFENDANTS SHOULD BE AFFORDED QUALIFIED IMMUNITY FOR THEIR PARTICIPATION IN AND FAILURE TO CORRECT A SHAM POLICE INVESTIGATION IS TOTALLY CONSISTENT WITH THIS COURT'S DECISION IN BUTZ V. ECONOMOU SINCE THEY WERE ACTING IN AN INVESTIGATIVE RATHER THAN AJUDICATIVE CAPACITY. (S.D. Pt. I)	48
E.	THE CIRCUIT COURT GOFF OR THOSE OF OTHER CIRCUITS, BECAUSE THE DEFENDANTS' POST-RAID LIABILITY IS SUPPORTED BY MUCH EVIDENCE INDEPENDENT OF THEIR GRAND JURY TESTIMONY. (S.D. Pt. IV)	51
F.	THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS HAD PROFERRED SUFFICIENT EVIDENCE OF THE DEFENDANTS' BAD FAITH TO REQUIRE A JURY DETERMINATION, AND DID NOT IMPROPERLY PLACE THE BURDEN OF PROVING GOOD FAITH ON THE DEFENDANTS. (S.D. Pt. VIII)	54
G.	THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS HAD TENDERED SUFFICIENT EVIDENCE OF THE STATE DEFENDANTS' ANIMUS, INDEPENDENT OF THE FBI'S COINTELPRO PROGRAM, TO NECESSITATE SUBMISSION TO THE JURY.	57
H.	THE CIRCUIT COURT CORRECTLY HELD THAT PLAINTIFFS' CONSPIRACY CLAIMS UNDER 42 U.S.C. 1983 SHOULD GO TO THE JURY: ITS HOLDING IS CONSISTENT WITH THIS COURT'S DECISION IN ADICKES V. KRESS, AND DOES NOT CONFLICT WITH CHAPMAN V. HOUSTON WELFARE RIGHTS. (S.D. Pt. VII)	59
I.	THE COURT OF APPEALS CORRECTLY APPLIED THE BALANCING TEST OF ROVIARO V. U.S. IN RULING THAT DEFENDANT GROTH MUST DISCLOSE THE IDENTITY OF HIS ALLEGED INFORMANT; AND THE COURT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S RULE IN FRANKS V. DELAWARE ON THIS ISSUE. (S.D. pt. II)	63
J.	THE PROCEDURES EMPLOYED BY THE COURT OF APPEALS IN DISPOSING OF THE STATE DEFENDANTS' APPLICATION FOR REHEARING EN BANC WERE FAIR, IN ACCORD WITH STATUTE, AND WITHIN ITS DISCRETION; AND THAT COURT'S ACTION PRESENTS NO ISSUE REQUIRING THIS COURT'S ATTENTION. (S.D. Pt. IX)	71
K.	THE FEDERAL DEFENDANTS, IN SEEKING REVIEW OF THE REVERSAL OF THE DIRECTED VERDICTS ON THE GROUNDS THAT THE COURT OF APPEALS' DECISION CONFLICTS WITH THE RULE OF BUTZ V. ECONOMOU, PRESENT NO CLAIM OR ISSUE WORTHY OF CONSIDERATION BY THIS COURT. (Fed. Deft. Point II)	75
L.	THE CIRCUIT COURT CORRECTLY FOLLOWED THE EXPRESS LEGISLATIVE INTENT AND "BROAD REMEDIAL PURPOSE" OF 42 U.S.C. 1988 IN AWARDING ATTORNEYS' FEES TO PLAINTIFFS ON APPEAL. (F.D. Pt. I, S.D. Pt. II)	84
V.	CONCLUSION	90

I. STATEMENT OF THE CASE

Just before dawn on December 4, 1969, fourteen Chicago police officers, members of a special detachment assigned to the office of Cook County State's Attorney Edward V. Hanrahan, raided an apartment in a black ghetto neighborhood on the west side of Chicago, where plaintiff-respondents (hereinafter referred to as "plaintiffs"), members of the Illinois Chapter of the Black Panther Party, were asleep. Armed with a floorplan of the apartment, provided by an undercover agent working in the FBI political counterintelligence program (COINTELPRO), and acting on the pretext of a search warrant for legally-purchased weapons, the officers burst into the apartment, firing as they came. Fred Hampton, the dynamic and outspoken Deputy Chairman of the BPP for Illinois, and Mark Clark, a party captain from Peoria, were killed; and four other party members, all teen-agers, were seriously wounded and permanently injured.

Ballistics evidence showed that the police fired between 90 and 99 shots; the occupants of the apartment one at most, a shot apparently fired by Clark as he fell mortally wounded from police fire. There was a pattern of cross-fire from an M-1 carbine and a Thompson sub-machinegun, fired through bedroom walls at the location where the floorplan showed Hampton's bed. Plaintiff Harold Bell, a veteran of two combat tours of duty in the war in Vietnam, testified that the raiders moved with swift precision to vantage points inside the apartment, setting up cover fire, and had total control of the premises in a matter of seconds. Fred Hampton died from two pistol shots through his brain, never rising from the bed in which he lay in an apparently drugged sleep.*

The raid and the killings caused a fierce public outcry in Chicago and across the country. Members of the Afro-American Patrolmen's League, after

*Rather than to submit a complete recitation of the evidence, we have as Appendix A the complete Summary of Evidence which we filed in the Seventh Circuit as part of our Appellate Brief. Comparison of this Summary of Evidence with the Statements found in defendants' petitions for certiorari will confirm that their "facts" are highly selective; stated in the light most favorable to them, and often the product of the defendants' potent imagination.

examining the apartment, called the killings "an obvious political assassination", and demanded an investigation. So did the National Association for the Advancement of Colored People, the Mayor of Hampton's home town, and the Congressional Black Caucus, several of whose members came to Chicago to attempt to investigate the event. Many hundreds of people from the community waited in line in the cold during the next days, to tour the apartment and see for themselves the pattern of bullet holes from the murderous fire of the police. Some five thousand people attended Hampton's funeral, where he was eulogized by Rev. Ralph Abernathy, Rev. Jesse Jackson, and other black leaders, while hundreds more stood outside in sub-freezing temperatures to listen to the services on loudspeakers.

The police announced immediately that the Panthers had opened fire when they approached the apartment, and they had fired in self-defense. Defendant Hanrahan held a press conference within hours of the raid, and denounced the "immediate, violent, criminal reaction of the occupants of the apartment, which emphasizes the extreme viciousness of the Black Panther Party." He extolled the "good judgement, considerable restraint, and professional discipline" of his officers, and pointed to a .45 caliber handgun with which he claimed Hampton had fired three times at the police. Hanrahan also said that all of the survivors, who had been arrested and brutalized by the raiders, would be prosecuted for attempted murder of the police. One officer, who had apparently been grazed by a pellet from the shotgun fire of another, and a second, who had cut his hand breaking a window, were paraded before the press and extensively interviewed as wounded heroes, and gave gripping, totally false accounts of the "hell" they had been through in the raid.

In the next days, however, the voices of the survivors began to be heard, and the physical evidence to be seen, and the horrifying truth, that the raid was a planned, deliberate political assassination of Hampton, began to be apparent.* Hanrahan, in a desperate attempt to stem the tide of

*The editor of the Chicago Sun Times, James Hoge, refused to run an article by a reporter who had been to the scene in which he challenged the police version of the events, until he was finally persuaded by the reporter to go to the apartment, and was appalled by what he saw.

publicity and demands for official investigation from all over the country, granted an "exclusive" interview to reporters from the Chicago Tribune, in which he put forward an elaborately false story of what happened, and provided photographs purporting to show bullet holes from shots fired by the Panther occupants. When these were checked by Sun Times reporters, the alleged bullet holes proved to be the heads of nails which had been driven into a door frame, and the rest of the ballistics evidence was seen to be totally at odds with the story purveyed to the Tribune by Hanrahan.

Hanrahan also arranged with CBS news to stage a reenactment of the raid, on a "set" specially constructed in his office for the purpose of convincing the public that his men were telling the truth. The officers and cameramen spent a whole day rehearsing and re-shooting the scenes, as was shown on parts of the film which were edited out of the final version, and it was aired both locally and nationally on December 11. Again because of the fact that no trace of Panther fire could be found, save for the one wild shot fired by Clark as he fell dead; and because the raiders continued to insist they had been fired upon, the broadcast raised more questions than it answered.

In response to growing public outcry, U.S. Attorney General John Mitchell in late December announced a Special Federal Grand Jury investigation pursuant to 18 U.S.C. 241, to be headed by Jerris Leonard, then the head of the Civil Rights Division of the Department of Justice. Post-Watergate investigations have revealed that Leonard at the time was also in charge of a secret interagency spying operation, which had as one of its main targets black ghetto organizations such as the Black Panther Party (CIA Commission Report, June 1975, pp.116-125). The federal Grand Jury inquiry was based on an investigation carried out by members of the Chicago office of the FBI, under the direction of the Special Agent in Charge, defendant Marlin Johnson. Johnson was also in charge of the Bureau's COINTELPRO operations in Chicago, and had supervision of the undercover agent, William O'Neal, who had supplied the floorplan and the alleged information about the weapons which was the basis for the purported warrant.

Johnson himself testified before the Grand Jury, but did not mention the FBI's crucial role in the raid, despite being asked to describe their involvement.

In early January, the raiders first presented their stories under oath, amid much publicity, at a Special Coroner's Inquest, before a handpicked "blue ribbon" jury. Defendent Groth denied that he had a floorplan of the apartment, that he knew Hampton frequented the apartment, and that Hanrahan was involved in the pre-raid planning--three crucial claims which he later had to admit were false. Defendant Sadunas, the police firearms examiner, testified at length concerning his alleged findings that two shotgun shells had been fired from a gun the raiders said had been held by plaintiff Brenda Harris, findings which critically supported the defendant's stories, and which later were also proven false. The jury found the killings to be "justifiable homicide", basing their determination on the fact that the plaintiff survivors of the raid, who still had false charges of attempted murder pending against them, refused to testify. On January 30, a Cook County Grand Jury returned a multi-count indictment for attempted murder and various other felonies against the surviving Plaintiffs. The indictments, by Hanrahan's own admission, were largely based on the testimony of Sadunas, Groth and the other raiders.

In late February, FBI firearms expert Robert Zimmers informed defendant Sadunas that Sadunas had made a crucial misidentification, and that the two shot shells identified as fired by Brenda Harris were in fact fired from defendant Ciszewski's gun. Hanrahan was informed of the misidentification in early March, and Sadunas confessed his error before the federal Grand Jury. On May 8, 1970, Hanrahan finally dismissed the indictments against the survivors, purportedly basing his dismissal on Sadunas' change in testimony.

On May 15, the federal Grand Jury issued its final report finding that the raiders had given "grossly inaccurate and distorted accounts" of what happened, which gave "basis for public doubt of their credibility;" and that the wide variance between what they said and what the physical evidence showed raised the question of whether they had deliberately falsified their stories. It said the raid was "ill-concieved" and "not professionally planned or

properly executed and the result was two deaths, four injuries and seven improper criminal charges." The jury felt the police could easily have evacuated the apartment and made arrests without firing a shot, and that the police department's internal investigation into charges of misconduct was "so seriously deficient that it suggested purposeful misfeasance." Report of the January 1970 Grand Jury, pp. 117, 118, 122, 126. See Appendix E.

Despite this, Mr. Leonard, after consultation with Attorney General Mitchell, did not permit presentation of any proposed indictments of the officers to the grand jury for a vote. Some five years later, through discovery, plaintiffs received a document (Pl #24) Hampton II, at 620, fn. 18, which showed that a deal had been struck between Hanrahan and Leonard in consultation with defendant Marlin Johnson in early April, before much of the evidence had even been presented to the Grand Jury. The terms of the deal assured Hanrahan that he and the raiding officers would not be indicted, and he in return would drop his indictments of the surviving Panthers in the state court. The unwritten "quid pro quo" from the FBI's point of view was, of course, Hanrahan's continued silence concerning the FBI's role in setting up the raid. See generally, Hampton II, at 617-20.

* * * * * * * * *

The raid, as the evidence clearly showed, had been brought about in large part by FBI agents operating under the "counterintelligence" program, whereby the Bureau had organized its self-ordained mission of protecting and preserving political orthodoxy in the American body politic, by means of secret operations designed for the repression of dissidents, especially black dissidents.

The earlier stage of the Bureau's campaign against the black freedom movement, during the 1960's, had most notably included operations aimed at furthering the rift within the Nation of Islam between the Honorable Elijah Muhammed and Malcolm X,** and Director Hoover's remorseless and obsessive personal vendetta against Dr. Martin Luther King.***

A major COINTELPRO policy memorandum**** called on FBI field office

*The report also strongly criticized Hanrahan's special police detachment, pointing out that it improperly mixed police and prosecutorial functions. The same month, the Unit was disbanded, and the raiders were returned to regular police assignments. Grand Jury Report, at 116.

**See FBI memos, Chicago to Headquarters, 1/29/69, 8/29/69.

***See Senate Select Committee on Intelligence, Final Report, pp. 79-183.

****FBI memo of 3/4/68, Plaintiffs' Exhibit #2.

personnel to "prevent the rise of a 'messiah' who could unify, and electrify, the militant black nationalist movement," and named King, Rap Brown, and Stokley Carmichael, and the fallen Malcolm X as targets and examples. The memo was issued barely a month before Dr. King was assassinated in Memphis, and signaled a major escalation in the FBI's committment to their thoroughly racist, often lethal, and always completely unconstitutional goals.

In Chicago by early 1968, Fred Hampton, then only 19 years old, had become the leader of the youth branch of the NAACP in the racially-torn suburb of Maywood, Illinois. Under his leadership, the youth organization grew from seventeen to seven hundred members, and began to actively organize against racial discrimination and police brutality. (Tr. 29164,32412-19) It was at this early stage that Defendant Piper and the FBI first officially targeted Hampton under COINTELPRO, and attempted to obtain a wiretap at his mother's house. (Pl. 69, 313)

In late 1968, just after the FBI ordered their COINTELPRO agents to redouble their efforts to "cripple the Black Panther Party" (Pl. #6), Hampton and Chicago Student Non-Violent Coordinating Committee leader Bobby Rush founded the Illinois Chapter of the Black Panther Party. It quickly became one of the strongest BPP chapters, building a large Free Breakfast for Children Program, and taking strong public stands on the war in Vietnam, the draft, police brutality and the right of black people to armed self defense, and the need for socialism in America. Hampton worked hard to forge alliances with Black, Latino and Appalachian white organizations, and had begun a significant effort to convince several large Chicago "street gangs" to stop warring with each other, and turn their attention to dealing with the oppression of black people.

Hampton spoke frequently before large crowds, often attacking State's Attorney Edward Hanrahan and his transparently racist "war on gangs," while eloquently expounding the politics of the BPP.* The FBI countered by having Hampton arrested on his way to a television appearance and attempting to

*His moving speaking style has been recorded on several audio and videotapes which were admitted into evidence at trial and by a full length movie, "The Murder of Fred Hampton" by Michael Gray, of "China Syndrome" fame, which won an award at the Cannes Film Festival.

entice alleged gang leader Jeff Fort to take violent action against Hampton and other Panther leaders. (See below, p.14) In April, 1969, Hampton was sentenced to 2-5 years in the penitentiary for allegedly stealing $71.00 worth of ice cream bars, immediately after Hanrahan had led a personal publicity campaign against the sentencing judge for his alleged leniency in another case.

He was released on appeal bond by order of the Illinois Supreme Court in August, 1969, and the Chicago BPP Chapter, which the FBI recognized had floundered in his absence, came back to life, as more than 300 people celebrated Hampton's return with a rally at a West Side church.

Once out of jail, Hampton continued to provide his gifted leadership, and redoubled his speaking and organizing efforts. Under the guidance of Ronald "Doc" Satchel a pre-med student and the Illinois BPP Minister of Health, the chapter organized the first BPP free medical clinic, which opened shortly after Hampton's death. Hampton led daily demonstrations protesting the gagging of Bobby Seale during the Conspiracy Trial, and the FBI focused even more attention on him. In November, after Hampton journeyed to the West Coast, O'Neal reported that he was in line for promotion to national leadership in the Party. Also in November, the Illinois Supreme Court denied Hampton's appeal, and he was scheduled to return to prison by the first of the year.

In late November, Hampton convened a statewide leadership conference in Chicago. Plaintiffs Mark Clark and Harold Bell, leaders in Peoria and Rockford, respectively, came to Chicago for the meeting, and stayed at Hampton's apartment; as did Brenda Harris, a diminutive 18-year-old University of Illinois student, Verlina Brewer, a 17-year-old from Ann Arbor who had come to Chicago to learn about the medical program; and Deborah Johnson, a 19-year-old college student, eight and one-half months pregnant with Fred Hampton, Jr. Also staying at the apartment that night were Blair Anderson, a 19-year-old converted "street gang" member and Louis Trueluck, an ex-prisoner who had befriended Hampton while he was in the penitentiary.

Brenda Harris was shot in the hand and the leg as she lay on a bed in the frontroom, just as the raiders entered the front door. Anderson, Brewer

and Satchel were riddled with fire from Defendant Gorman's machine gun while they lay huddled on the floor of the middle bedroom. Brewer was permanently crippled by a shot which shattered her knee, Satchel suffered multiple wounds of the abdomen which necessitated removal of a large portion of his colon, and Anderson was shot in the leg and penis. Bell, Trueluck and Ms Johnson were dragged to the kitchen, handcuffed, and thrown to the floor, where they were cursed at, kicked and beaten by a number of officers. Mark Clark was shot through the heart by Officer James "Gloves" Davis the moment he broke open the front door and entered the living room. Hampton, as mentioned, was shot twice in the head as he lay in a drugged stupor, probably by Officer Carmody, who entered the rear bedroom to administer the coup de grace, and then dragged the body out into the dining room. (See generally pp. 37-48, Plaintiffs' Appellate Brief, and citations therein, attached as Appendix A.)

* * * * * * * *

In June and December, 1970, the plaintiffs filed four damage actions against the raiding officers, State's Attorney Hanrahan, his assistant, Richard Jalovec, who helped plan and supervise the raid, and several additional police and state's attorney's personnel who participated in the subsequent cover-up. The City of Chicago, its Mayor and Superintendent of Police, and the County of Cook were also named. The complaints, under 42 U.S.C. 1983, 1985, 1986, and 1988, alleged violations of the First, Fourth, Fifth, Eighth, Thirteenth, and Fourteenth Amendments, and conspiracy, and

also included pendent state claims for wrongful death, assault and battery, false arrest, and malicious prosecution. Plaintiff Brewer, a Michigan resident, also alleged diversity jurisdiction under 28 U.S.C. 1332. The complaints were consolidated before U.S. District Court Judge Joseph Sam Perry.

Public indignation was strongly regenerated by the "whitewash" effect of the Justice Department's failure to obtain indictments of the raiders from the federal grand jury. Acting upon the petitions of several legal and community groups, the Chief Judge of the Circuit Court of Cook County appointed Chicago attorney Barnabas Sears as Special Prosecutor, and Sears proceeded to present evidence to a Special Cook County Grand Jury. The Grand Jury voted to indict Hanrahan, certain raiders, and other officials involved in the coverup, for conspiracy to obstruct justice. They deadlocked on a ten to ten vote and thus did not include a count of attempted murder. Judge Joseph Power, a close associate and former law partner of Mayor Daley, refused to publish and file the indictments, however, and the Illinois Supreme Court ordered them released on August 23, 1971. (See People ex rel. Sears v. Power, 49 Ill. 2d 14, 273 N.E.2d 380 (1971). People ex rel. Sears v. Romiti, 50 Ill. 2d 51, 277 N.E.2d 705 (1972). The case was finally tried in the summer and fall of 1972. Judge Philip Romiti, a democrat sitting without a jury, entered a directed finding of acquittal at the close of the prosecution's case, barely a week before the election for State's attorney, causing one of the assistant special prosecutors to call the trial "fixed" (Chicago Daily News, April 8, 1971, p. 11). The next week, irate Chicago citizens voted Hanrahan out of office, electing Bernard Carey as State's Attorney. It was later learned that a long time confidential agent of the Mayor's, Jack Clark, had been planted in the prosecutor's camp, and was reported to have attempted to install a secret microphone in the Grand Jury room. (Chicago Sun Times, 5/20/71, 5/13/73, p. 1, 5/10/73, p. 2.)

Discovery in Plaintiffs' civil rights case was stayed by the District Court while the criminal case was pending. On February 3, 1972, Judge Perry issued an order dismissing all defendants except the 14 police officers who participated in the raid itself. Hampton v. City of Chicago, 339 F.Supp. 695 (N.D. Ill. 1972). The Court held that Hanrahan and his assistant State's

Attorneys were judicially immune for all activities before and after the raid, and that the City and County were not "persons" under 42 U.S.C. 1983 and hence not amenable to suit. He held that the Mayor and Police Superintendent were not alleged to have been personally involved, and that there was insufficient showing that police personnel who participated in the coverup had caused any constitutional deprivation to the Plaintiffs.

Plaintiffs appealed this ruling to the Seventh Circuit, and, on August 24, 1973, the Court issued an opinion affirming in part and reversing in part. Hampton v. City of Chicago (Hampton I), 484 F.2d 602 (7th Cir. 1973). Judge (now Mr. Justice) Stevens, writing for the Court, held that defendants Hanrahan and Jalovec were not immune from suit for "planning a raid in order to obtain evidence of criminal activity," because such functions were "investigative, police functions," not covered by the immunity afforded to prosecutors. The Court held further that the allegations against officials involved in the coverup "raised questions of fact," and reversed their dismissal. Dismissal of the City, County, Mayor, and Police Superintendent was affirmed. After the opinion was issued, plaintiffs moved the Court of Appeals to include in its mandate a direction that the case be re-assigned to another District Judge. Noting that "massive discovery loomed," and that the trial would be "long and arduous," they asked the higher Court to remove this "grueling burden" from a senior judge they said had clearly shown his "predilection against the plaintiffs," and an "animus against their case." This motion was denied.

In December of 1973, the Commission of Inquiry Into the Black Panthers and the Police, chaired by Roy Wilkins and Ramsey Clark, issued their Report on the December 4th raid. It made, inter alia, the following findings:

> -Whatever their purpose, those officials responsible for planning the police action and some who directly participated acted with wanton disregard of human life and the legal rights of American citizens.
>
> -There can be no possible legal or factual justification for this police use of firearms. There was no "shoot out." The police did virtually all, if not all, of the shooting and most of it blindly. If the one shot that can be attributed to a Panther was fired, and was fired first, it could not justify the more than eighty shots that were fired by the police. If any of these shots were fired in the mistaken belief that they were being fired in response to fire from the Panthers, that such a belief was entertained by police officers would evidence the inadequacy and consequent irresponsibility in planning and control of an operation involving the use of lethal force.

-State's Attorney Edward V. Hanrahan's statements that the police acting under his authority "exercised good judgment, considerable restraint, and professional discipline," and that "The immediate, violent criminal reaction of the occupants in shooting at announced police officers emphasizes the extreme viciousness of the Black Panther Party," render him unworthy of public trust.

-Systems of justice--federal, state, and local--failed to do their duty to protect the lives and rights of citizens.*

Search and Destroy, A Report by the Commission of Inquiry Into the Black Panthers and the Police, Metropolitan Applied Research Center In Harper and Row. 1973, pp. viii, 14. Appendix F

The Report went on to find that "there is probable cause to believe that Fred Hampton was murdered--that he was shot by an officer or officers who could see his prostrate body lying on the bed." Id., at 246. The Commission also stated its opinion that:

> the federal grand jury Report of the raid was inadequate--inadequate not only as a substitute for indictments but also as an exposition of what happened during the police action. The Report has every quality of a whitewash. Two people were dead and four seriously injured. Police had fired scores of rounds of ammunitior; Panthers had fired one shot, at most. Assistant Attorney General Jerris Leonard, who headed the federal investigation, had led members of the Commission of Inquiry with whom he met in Justice Arthur Goldberg's office in early 1970, to believe that indictments would be forthcoming. Instead, there was an insufficient report and no legal action.
>
> Id., at 152-3

---

*Other findings which the Commission made:

> -The search warrant for the premises, assuming it was legally supportable, could have been executed in a lawful manner with no significant risk to life.
>
> -The hour of the raid, the failure to give reasonable warning to the occupants, the overarming of the police, the wildly excessive use of gunfire, all were more suited to a wartime military commando raid than the service of a search warrant.
>
> -It is not safe to entrust enforcement of the laws to authorities who permit the use of a machine gun the way the Chicago police did during the episode.
>
> -Many statements made after the episode by participating police officers, such as that of Sergeant Groth that "Our men had no choice but to return their fire," are not credible.
>
> -The failure of the Chicago police and other state and local officials to employ basic investigative practices such as fingerprinting, preserving evidence, examining all firearms, sealing the premises, and examining and photographing the bodies before removing them, as well as gross errors on the part of these officials in ballistics, autopsy, and other examinations, are professionally inexcusable and can only undermine confidence in the competence and integrity of the police and the legal system.
>
> -The "exclusive" account of the police action given by State's Attorney Hanrahan's office to the Chicago Tribune, and the filmed re-enactment of the episode by police for CBS-TV, demeaned public office, misinformed and prejudic ed the public, and violated professional ethics.
>
> Id., at viii

Also in late 1973, the state defendants petitioned this Court for certiorari, raising, inter alia, the questions of whether defendant Hanrahan's pre-raid planning was covered by absolute immunity, and whether a sufficient post-raid conspiracy had been alleged against certain defendants. In early 1974 this Court denied the petition. City of Chicago v. Hampton, 415 U.S. 917 (1974).

* * * * * * *

While the case was on appeal, the Government revealed that defendant William O'Neal, a Chicago Black Panther member, was in fact an undercover operative and informant. O'Neal, who had participated with a Chicago police officer, Stanley Robinson, in an alleged "murder-for-hire" ring, was surfaced as a key witness against Robinson in a prosecution for deprivation of civil rights. See U.S. v. Robinson, 503 F.2d 208 (7th Cir. 1974); Beard v. Robinson, 563 F.2d 331 (7th Cir. 1978). In the fall of 1973, after testimony in which he admitted to participating in at least one murder, O'Neal was given a new identity and relocated by the Government. Also during this time period the FBI, pursuant to a Freedom of Information Act suit filed by NBC reporter Carl Stern, released the first COINTELPRO documents, revealing that, in 1969, the FBI had operated a secret program of political repression, designed to "expose, disrupt, misdirect, discredit and otherwise neutralize" so-called "militant black nationalist" organizations. (Plaintiffs' Exhibits 1 and 2)

After remand, the plaintiffs subpoenaed FBI documents pertaining to the December 4th raid. In early 1974, O'Neal was deposed at a secret site, and admitted to having communications with the FBI concerning Hampton's apartment just prior to the raid. A few months after the deposition, the FBI, after promising a "truckload" of documents, produced 34 documents, and swore these were all the documents "relevant" to the raid, the plaintiffs, and the Chicago Black Panther Party.*

---

*Rather than reciting the entire history of what the Circuit Court below aptly described as the "defendants' obstruction of justice, suppression of documents, and dilatory tactics," we attach the factual summary of these events, which was part of our Appellate Brief, as Appendix B.

Among these was the floor plan of Hampton's apartment, marking the bed where Hampton slept, drawn by O'Neal and his control agent, defendant Roy Mitchell. An accompanying memo stated that it was provided to the Cook County State's Attorney's Office, just prior to the December 4th raid. The plaintiffs then pursued further discovery, deposing special agent Mitchell, his supervisor on the Chicago FBI "Racial Matters" squad, Robert Piper, and Special Agent in Charge (SAC) Marlin Johnson. Although these deponents refused to answer questions concerning COINTELPRO, the plaintiffs nonetheless developed enough evidence to join O'Neal, Mitchell, Piper and Johnson as defendants in the conspiracy, in an amended and consolidated complaint filed on December 3, 1974, which alleged that the FBI defendants' motivation, and intent was embodied in the COINTELPRO program.*

In the Spring of 1975, the District Court ordered a severance of the federal defendants from the case against the state defendants, effectively neutralizing the plaintiffs' conspiracy claims. The plaintiffs filed a petition for a writ of mandamus in the 7th Circuit, protesting the severance, and raising certain discovery issues, including the adamant refusal of defendant Daniel Groth, a police sergeant who had been in command of the raiding party, to reveal the identity of a purported second informant upon whose information he swore he was relying in his affidavit seeking the search warrant which was the pretext for the raid. The District Court had asked him what his response would be to a direct order to disclose the name. After he said he would refuse, the Judge denied the plaintiffs' motion to compel.** On May 27th, the Court changed his mind about the severance. On May 29th the Court of Appeals dismissed the Petition, citing mootness as to the severance, and saying that, at this stage of the case, it could not say the District Judge had abused his discretion with respect to discovery matters.***

During 1975, the plaintiffs repeatedly sought to discover FBI documents relevant to their case, especially COINTELPRO documents from the Chicago

*Named as "usued co-conspirators" in the amended complaint were then Attorney General John Mitchell, FBI Director J. Edgar Hoover, and Justice Department Officials Jenis Leonard, Will Wilson, Robert Mardian and Robert Woheide. (Amended and Consolidated Complaint, Par. 56)

**We have attached our recitation of the facts relevant to the Groth informant issue, also filed in our Appellate Brief, as Appendix C.

***At this time, much of the evidence that Groth did not have an informant was still hidden in the FBI files.

office files. In March, the federal defendants delivered a packet of COINTELPRO documents, ex parte and in camera, to the trial judge at his house. He found them "irrelevant," and returned them to the Government. In late 1975 the Senate Select Committee on Intelligence and the Rights of Americans (The Church Committee), publicly released some Chicago COINTELPRO documents concerning the BPP, including a document in which the FBI defendants wrote that the December 4th raid was part of COINTELPRO (Pl. #25), and a series of documents which revealed attempts by FBI defendants to induce Chicago "street gang" leader Jeff Fort to take violent action against Hampton and the Chicago BPP by sending Fort an anonymous letter saying the Panthers had a "hit," i.e., a murder contract, out for him. (Pl. #9-11) These documents were among those deemed "irrelevant" by Judge Perry in his in camera review.

Armed with this information plaintiffs again moved for production of Chicago COINTELPRO documents, in December, 1975, but the District Court denied the motion before the Defendants even had a chance to respond. On December 19, 1975, the District Judge privately told a U. S. attorney previously assigned to the case that the plaintiffs would "never prove the FBI killed those fellas."*

On January 5, 1976, the plaintiffs' belated motion to add Jerris Leonard and John Mitchell and COINTELPRO architects William Sullivan and Charles Brennan, the estate of J. Edgar Hoover, and other high-level officials as additional defendants was denied without prejudice, and the plaintiffs were forced to trial without ever having seen the great bulk of their documentary evidence of conspiracy against the FBI defendants.

On January 27, 1976, after the jury was chosen, the Court changed his earlier ruling and ordered that the FBI produce all of its COINTELPRO files concerning the BPP, as well as all files on the named plaintiffs and informant William O'Neal. The government began to produce these files as plaintiffs went ahead with their first witness, defendant Marlin Johnson. Johnson's testimony became in effect a discovery hearing before the jury, as the plaintiffs

*In October of 1975, the plaintiffs moved, pursuant to 28 U.S.C. 144 to recuse Judge Perry, who after first flying into a rage and refusing to permit the motion to be filed, later transferred the motion to Judge William Lynch, another former law partner of Mayor Daley, who denied it. Recusal was twice renewed in the spring of 1977, after the dismissal of Hanrahan and the FBI defendants.

each day received new COINTELPRO documents, highly relevant to their claims, which had been authored, approved and sent by the witness. In mid-February the government attorneys, in the presence of their FBI clients, repeatedly represented to the Court that they had produced the complete FBI files on O'Neal and the Plaintiffs, documents totalling approximately 500 pages.

In early March, while defendant Roy Mitchell was on the stand, he inadvertently revealed that the FBI defendants and their government attorneys had in fact withheld some parts of the files. After a week of stalling by the federal defendants, the Court directed the government to bring in the complete original files which had been ordered produced two months before, and FBI agents appeared in the courtroom pushing carts piled high with more than 125 volumes, perhaps fifty times the number of pages that had been repeatedly called "everything" by the assistant U.S. Attorneys and Department of Justice lawyers. The documents were turned over to plaintiffs in redacted form over the next ten weeks. The trial court denied plaintiffs' motion for a mistrial, and refused even to continue the trial so that they could review the 25,000-odd pages which were now turned over. Plaintiffs were thus compelled to examine the other FBI defendant-witnesses in front of the jury in the daytime, while reading the documents at night. More than 50% of the FBI documents ultimately introduced in evidence by plaintiffs at trial were among those deliberately withheld, including two "smoking gun" items, in which defendants Piper and Mitchell, in a memo to FBIHQ, claimed credit for the raid, admitted that defendant Groth did not have a separate informant, and sought a bonus for defendant O'Neal for his work in setting up the raid. (Pl. #83,* 91) Testimony by FBI agents revealed that defendant Piper had the actual supervision of the process within the FBI by which the files had been culled for documents to produce and not produce.

The relevation of this massive withholding received wide public attention in Chicago, and there was a demand for an impartial investigation of the coverup, spearheaded by two black state legislators, Senator Richard Newhouse and Representative Harold Washington, Roy Wilkins of the NAACP, and the Chicago Council of Lawyers. The U.S. Attorney's Office instead announced its own investigation of the matter. The plaintiffs moved for sanctions against the federal defendants and their attorneys, pursuant to Rule 37, including con-

*See Appendix G.

tempt and default judgment. The Court refused to hold a hearing, and deferred ruling until after the trial.

After this appeal was decided, documents were released by the U.S. Attorney's office under the Freedom of Information Act which show that the Judge, in April, 1976, wrote three ex parte letters to the United States Attorney and the Department of Justice, informing them that he intended to rule in favor of the FBI defendants and their lawyers, declaring them blameless, and urging that the investigation be ended.* The FBI defendants refused to cooperate in the investigation, and it was quietly dropped. Plaintiffs' Petition for disciplinary action against Judge Perry, filed in November, 1979, after the letters were finally released, has been taken under advisement by the Court of Appeals. (Court of Appeals order 11/20/79)

The Church Committee issued its Final Report in early May, 1976, concluding that, under COINTELPRO, the FBI "in essence took the law into its own hands, conducting a sophisticated vigilante operation against domestic enemies" ..."aimed squarely at preventing the exercise of First Amendment rights of speech and association;" and that it was a case of "a law enforcement agency turned into a law violator." The Committee said many of the "no-holds-barred techniques" employed "may have violated criminal statutes," "involved risks of serious bodily injury or death to the targets," and

> would be intolerable in a democratic society even if all of the targets had been involved in violent activity, but COINTELPRO went far beyond that. The unexpressed major premise of the programs was that a law enforcement agency has the duty to do whatever is necessary to combat perceived threats to the existing social and political order.
>
> Supplementary Detailed Staff Reports on Intelligence Activities and the Rights of Americans, Book III, Final Report of the Select Committee to Study Governmental Operations with respect to Intelligence Activities, April 23, 1976, p. 3, 410.

In a chapter of the Report entitled "The FBI's Covert Action Program to Destroy the Black Panther Party," it was stated that "the chief investigative branch of the Federal Government, which was charged by law with in-

*The Judge did not issue his order on sanctions --which tracked the conclusions in his letters--until April of 1977. The defendants therefore were fully and secretly informed by the Court of his ruling on a crucial issue before him a full year before he actually ruled. See plaintiffs' motion of 11/14/79. (See Appendix H.)

vestigating crimes and preventing criminal conduct, itself engaged in lawless tactics and responded to deep-seated social problems by fomenting violence and unrest." (Ibid, at p. 189). It said:

> We have been able to establish beyond doubt, however, that high officials of the FBI desired to promote violent confrontations between BPP members and members of other groups, and that those officials condoned tactics calculated to achieve that end. It is deplorable that officials of the United States Government should engage in the activities described below, howerer dangerqus a threat they might have considered the Panthers; equally disturbing is the pride which those officials took in claiming credit for thebloodshed that occurred. (Ibid)

Upon a careful study by the staff of the Bureau's operations against the BPP in Chicago,* the report said that the Bureau's actions in sending the anonymous letter to Jeff Fort, warning of a so-called "hit" intended by the Panthers, was a prime example of its indifference to the dangers its operations created. (Ibid, at 195-98) The raid itself was cited as indicative of the Bureau's practice of enlisting the "cooperation of local police deaprtments in its covert action programs to disrupt and neutralize the BPP...by encouraging raids on the homes of BPP members." (Id., at 220-23)

On May 30, 1976, the Judge, in another off-the-record communication, told a minister from Maywood that the conspiracy between Hanrahan and the FBI charged by the plaintiffs was "impossible," and that there was "no earthly way" the plaintiffs would ever prove it.

The trial continued to be highly charged with the effects of Judge Perry's bias against the plaintiffs and their lawyers, blatantly encouraged by the tactics of defense counsel. Plaintiffs' attorneys Haas and Taylor were both held in contempt, and spent time in the Metropolitan Correctional Center, on citations which were reversed by the Court of Appeals in a decision not challenged here;** (See 600 F.2d at 644-648) and the Court continued to countenance the obstructive tactics of the defendants and their lawyers.

---

*In December of 1975 the Committee moved before the District Court for access to Hampton discovery materials and documents, which had already been produced, and this request was granted.

**Taylor was cited once earlier in the trial when he supposedly spoke out of turn, but the citation was later vacated.

During the trial, apparently without limit on the amount they could spend, the defendants purchased four sets of "hourly" copy from the official reporters. The City and the County each paid $3.00 of the taxpayers' money per page, and the government paid $2.50 per page for one copy and $.25 for a second copy. The Court also received a copy, which was presumably paid for at the regular rate.

The District Judge refused to order that plaintiffs, who were poor and working people, and whose counsel had labored without compensation since the beginning of the case, be given a free copy or allowed to photocopy the Court's transcript. Ultimately, counsel learned from the reporter that the bargain by which he was paid a total of $8.75 per page for the "hourly" transcript (which in fact was delivered twice daily, at noontime and about 6:00 p.m.) was conditioned on his promise to counsel for the state defendants that he would not provide the plaintiffs with copy for anything less than $3.00 per page.*

The trial judge permitted plaintiffs' counsel to use his copy of the transcript, but only while the Court was in session; and he often withdrew this "privilege" when he was displeased. Informed of the flim-flam wherein each government paid separately for the transcript, he not only refused to conduct any inquiry, but actually entered an order approving it. The taxpayers, therefore, paid roughly $290,000.00 for the trial transcript. See plaintiffs' motion for contempt and sanctions, November 11, 1976, and Appendix I.

In early April, 1977, the plaintiffs concluded presenting evidence after the Court, reneging on an earlier promise to the contrary and despite the fact that plaintiffs received many important FBI documents written and approved by the federal defendants after they had testified, refused to permit them to be recalled. On April 15, 1977, the Court, after giving the plaintiffs five days over the Easter weekend to answer 300 pages of motions for directed verdict submitted by the defendants, granted them all except as to the seven police officers who admitted firing their weapons at the apartment. In a companion order, he completely "exonerated" the federal defendants

---

*Counsel have no information as to how much the reporter received for his regular attendance at Court and for the Judge's copy of the transcript, over and above the hourly copy fee.

and their attorneys for their massive coverup, without hearing evidence on plaintiffs' motion for santions. His order paralleled his ex parte letters to the government the year before.

The seven "shooter" defendants then proceeded to present their defense. After evidence was concluded, the Court struck the plaintiffs' claim for punitive damages, only to reinstate it when plaintiffs filed yet another mandamus petition in the Seventh Circuit. The case went to the jury on Friday, June 17, 1977. On Saturday, June 18th, the jury first reported that they were deadlocked. The Court did not inform plaintiffs' counsel until Monday, June 20th, when the jury again informed him that they were "hopelessly deadlocked." He then declared the jury hung, and, instead of declaring a mistrial, granted a defense motion and denied plaintiffs' motion for leave to proceed in forma pauperis on appeal. On July 28, 1977, after Notice of Appeal had been filed, the trial judge issued his bizarre and unexampled "Summary," purporting to set forth his rationale in granting the directed verdicts. The Court of Appeals elected to consider the Summary as his opinion on the directed verdicts, and held that it showed he had erroneously considered the evidence in the light most favorable to the defendants.

On August 25, 1977, the Court of Appeals, by order of Judges Fairchild, Swygert, and Pell, granted the motion to proceed in forma pauperis, and relieved plaintiffs of the insurmountable burden of posting an appeal bond. Plaintiffs filed their brief on January 4, 1978; the defendants filed their responses in May, and plaintiffs' Reply was filed in June. Sitting in special session, the Court heard 3½ hours of argument on August 14, 1978. Judge

*As they did in the trial, the state defendants have gone to great lengths in their petition, attempting to create the impression that there was real evidence to support their claim that they were fired upon by the occupants of the apartment. (St. Pet. pp. 17-38, 40-42.) In fact, there is nothing but the sheerest speculation about possibilities, all of which were contradicted by the fact that none of the defendants were hit while in the doorways they try so hard to suggest that the occupants shot through without hitting anything; the testimony of the raiders who stayed outside and said no shots came out; the testimony of the raiders who entered, fixing locations of the occupants in places where they could not have fired without leaving impact points inside; the findings of the FBI ballistics expert, who considered and rejected each alleged impact point put forward by the defendants, and concluded that the occupants fired only one shot; and finally, the sworn trial tesimony of all of the plaintiffs that none of them fired a weapon that morning. (For a further discussion of this evidence, with transcript citations, see pp. 37-48 of the Statement of Facts, in plaintiffs' Brief in the Court of Appeals, as Appendix A.)

Swygert was given special dispensation from his caseload to carefully examine the 40,000 page record, and prepare the majority opinion. While the Appeal was pending, the FBI publicly released numerous additional documents pursuant to the Freedom of Information Act, several of which were highly relevant to plaintiffs' claims, but had never been turned over to the plaintiffs.* The Appellate briefs were supplemented with these documents. On December 15, 1978, Chief Judge Fairchild issued an Order providing that Judge Perry, along with fellow senior judge Julius Hoffman, would henceforth be prohibited from taking on any cases in which the trial was expected to last more than twenty-five hours.

* * * * * * *

As of September 12, 1979, when the Court of Appeals announced its denial of the various petitions of the defendants for rehearing, the Treasurer of Cook County and the Comptroller of the City of Chicago had paid out a total of 1.6 million dollars in public funds as fees and expenses for legal representation of the police officers and State's Attorneys named as defendants in the case. The cost to the federal government of defending the three FBI agents and their paid informant was reliably estimated at $485,000, including some $36,000 paid to defendant O'Neal for his services as a witness in the trial.**The county monies have been paid to a special assistant state's attorney, John Coghlan, and his assistant, Joe Witkowski, who had been hired by the County Board after representing Hanrahan in the criminal trial, and after Hanrahan's successor, Bernard Carey, determined that there would be a conflict of interest if his office were to represent Hanrahan and the others in the civil case. Another attorney from the defense team in the criminal trial, Camillo Volini, was similarly retained as a special assistant corporation counsel by the City of Chicago to represent the police officers.

*Several of these were appended to plaintiffs' reply brief and included in one 1963 COINTELPRO document which called for "removing black militant leaders from the scene by arrest, police, or court action."

**For a complete summary of these fees and costs, see Appendix I.

Special Assistant State's Attorney Coghlan, since his appointment in 1973, has submitted regular billing statements to the trial judge, ex parte, usually every month. These are then forwarded to the County Treasurer, accompanied by actual orders from the Court, finding them to be proper and appearing to direct that they be paid.

These billings have recently included a charge of some $25,000.00 for the Coghlan/Witkowski share in preparation of the defendants' 26-page petition for rehearing of the appeal, and more than $43,000.00 for the 4-month period ending November 30, 1979. The instant petition was filed in mid-December, 1979. Thus, the bills so far received do not include work done in December, 1979, during the last two weeks of preparing the defendants' petition for certiorari; and likewise do not include the fees for the special Corporation Counsel, who we have always understood is the main draftsman of the joint pleadings the state defendants always submit.

The District Judge had never, insofar as we can ascertain, raised the slightest question of the propriety of the total bills submitted to him for approval by the special assistant State's Attorney; and has gone on regularly applying his imprimatur to this looting of the public coffers despite having lost all jurisdiction of the case almost three years ago.* Including other "hidden" costs, such as the salary of a police officer assigend full time as an "investigator" for the state defendants--to say nothing of the salaries of the police defendants themselves, who were apparently detailed to the courtroom throughout 18 months of trial--the cost to the taxpayers for the last six years of official stonewalling of the truth about December 4th by three governments appears to have run easily to the neighborhood of $2.5 million dollars. (Appendix I.)

---

*On January 29, 1980, by draft order he approved Mr. Coghlan's $43,000. bill. (See Appendix I.)

II. OPINION OF THE COURT BELOW

The Court of Appeals issued its opinion on April 23, 1979. Hampton vs. Hanrahan 600 F. 2d 600 (7th Cir., 1979). The majority opinion, written by former Chief Judge Luther Swygert and concurred in by Chief Judge Fairchild included the following holdings:

1) The trial court in granting directed verdicts, erroneously considered the evidence in the light most favorable to the defendants rather than the plaintiffs, improperly weighed the evidence and the credibility of witnesses, and invaded the province of the jury. Hampton II at 608, 625. The Court of Appeals, "considering all the evidence in the light most favorable to the plaintiffs, disregarding conflicting, unfavorable testimony, and extracting all reasonable inferences," reversed the directed verdicts as to almost all the defendants, and almost all plaintiffs' claims. Id.

2) The Plaintiffs made out a prima facie case of two conspiracies, the first covering the planning and preparations for the raid and the raid itself, and being "designed to subvert and eliminate the Black Panther Party and its members", with the "common plan being the raid." Hampton II at 621, 22, 24. The second conspiracy consisted of the "alleged coverup of evidence regarding the instigation, preparation and execution of the raid and the post-raid legal harassment of the plaintiffs". It was "intended to frustrate any redress the plaintiffs might seek, and more importantly, to conceal the true nature of the preraid and raid activities of the defendants involved in the conspiracy:" and "to continue an unfounded prosecution." Id. at 621-22, 628. The Court further held that it could not presently determine whether plaintiffs might be able to show one continuing conspiracy on retrial, because discovery had been "hampered unduly" by the trial court. Id. at 622.

3) Defendants Hanrahan and Jalovec, were acting in a police-type investigative capacity, rather than their judicial role as prosecutors, in planning the raid, and were therefore entitled only to qualified immunity under Imbler vs. Pachtman, 424 U.S. 409 (1976). Further, the two were not absolutely immune for their "post-raid publicity campaign," but would have such immunity for their prosecutorial role in initiating and continuing the malicious prosecution

against the plaintiffs. Id. at 631-35. The Court also afforded the federal defendants only a qualified immunity under the rule of Butz v. Economou, 438 U.S. 478 (1978).

4) The federal defendants and their attorneys "deliberately impeded discovery and actively obstructed the judicial process", "repeatedly disobeyed Court orders to produce documentary materials," engaged in "dilatory and obstructive tactics," and "suppressed evidence." Id. at 628, 641. The Circuit Court ordered a hearing, on remand, to determine "what if any sanctions should be imposed against the federal defendants and their attorneys for their suppression of evidence."--Order of 12/12/79, at p. 3 (Attached as Appendix J.). Hampton II at 642,649.

5) The defendant's obstructionist tactics "regrettably " were permitted by the trial court, who "repeatedly exonerated the federal defendants for their derelictions," "wrongfully impeded the plaintiffs' presentation of their case" by his "restriction on discovery and his questionable evidentiary rulings," and, rather than " applying sanctions against the defendants and their counsel, instead assessed costs against the plaintiffs for the government's time" in reproducing the withheld documents. Id. at 608, fn. 6, 622, 641.

6) These actions by the defendants and the trial court "had a crippling effect on the Plaintiffs' case," and "denied plaintiffs the fair trial to which they were entitled." The Court concluded that:

> (i)f there were any doubts about the sufficiency of the evidence when considered under the applicable standard constituting a jury question on liability, the delay of the federal defendants in meeting their obligations to produce relevant documentary material would supply a basis for an inference that plaintiffs were unable to present all the available evidence and thus were denied the opportunity to prove their case. Id. at 639, 641-42.

The Court held that plaintiffs shall be afforded complete discovery on remand. Id. at 642.

7) Although the trial court "resisted the plaintiffs' efforts to develop a record", there was "considerable evidence" supporting plaintiffs' contention that Sergeant Groth did not have a separate informant, as he swore in the search warrant; that such an admission would be "powerful evidence" in

support of plaintiffs' claims of conspiracy, bad faith, and violation of the Fourth Amendment; and that, if there actually were a second informant, knowledge of his/her identity as a possible co-conspirator would still be crucial to the plaintiffs' case. Id. at 637-38. The Court found further that the trial court had ignored the standard set in Roviaro vs. U.S., 353 U.S. 53 , (1957), when he refused to order Groth to reveal the identity of his purported informant. Applying the Roviaro balancing test the Court of Appeals directly ordered that Groth must reveal his purported informant's identity, under appropriate protective order, upon remand. Id. 637, 639.

9) The conduct for which plaintiffs' attorneys Haas and Taylor were held in contempt by the trial court did not interfere with the conduct of the trial, or obstruct the administration of justice; rather the trial court's prejudicial and vindictive actions caused the attorneys "to reach the breaking point of their patience and forbearance," and the contempt citations were "unwarranted when considered in their factual setting." Id. at 644-48, 647-48.

10) The plaintiffs, pursuant to 42 U.S.C. 1988 were to be awarded attorneys fees for the appeal, since they prevailed, as part of the defendants' costs. The Court held that if plaintiffs establish liability on retrial they should collect fees in the District Court, for the first trial as well. Id. 643-44. The Executive Committee of the District Court, under Rule 18, is directed to reassign the case to another judge, who should give the retrial "high priority".

Judge Pell concurred in the reversal of the directed verdicts as to the seven police defendants who fired their weapons, agreed that attorneys fees should be awarded to the plaintiffs for prevailing on appeal to that extent, and joined in the direction that a hearing should be held on the issue of discovery sanctions against the F.B.I. defendants and lawyers. He dissented from the remainder of the decision, with a bitter political broadside condemning the Black Panther Party, extolling the general virtues of law enforcement and its response to the Panthers, and heaping opprobrium on plaintiffs' attorneys.*

*Footnote on following page.

Several petitions for rehearing were filed. When the Department of Justice declined to seek rehearing on the issue of discovery sanctions, and the contempts, the U.S. Attorney's Office and the trial judge, respectively, filed for rehearing on these issues. Two of the eight active Circuit Judges recused themselves from consideration of the petitions, as they had from the case in chief, apparently because of earlier affiliation with the Department of Justice and the local United States Attorney's office. The Court denied the petition for rehearing, voting 6-0 on the directed verdict against the shooting policemen , and 3-3 on the other issues raised.

Pursuant to the Court's decision, plaintiffs' attorneys calculated the time expended on this appeal and petitioned the Court to set the amount of their appellate fees. The undersigned, attorneys for the "Clark plaintiffs," requested payment for some 3600 hours of work, at rates from 40-90 dollars per hour, in the amount of $288,172.50 ; and asked the Court to employ a "multiplier" to enhance the award, on the basis of the complexity and unique public importance of this case. James Montgomery, attorney for the "Hampton plaintiffs," requested payment for 1835.75 hours of work, for a total of $111,056.25, and also requested a multiplier.**

On December 12, 1979, the panel issued an order, joined in by all three judges, setting the amount of attorneys fees. The Court found that the

---

*(From preceding page.) Subsequent to the order denying rehearing, the undersigned plaintiffs, after learning belatedly that Judge Pell was a former F.B.I. agent who had been for 30 years a member of the powerful F.B.I. lobbying group, the Society of Former F.B.I. Agents, moved that he be recused from all further proceedings, and that his dissent be stricken. Judge Pell denied the motion on November 15, 1979.

**In contrast, lawyers for the City and County defendants alone, had billed their respective taxpayers for 6840.4 hours for their work in losing the appeal, for which they were paid in full: The total cost to the taxpayers for representation of the defendants in the Court of Appeals alone was approximately $400,000.00.

plaintiffs had achieved

> substantial success on the merits of the appeal, including the reversal of the directed verdicts, the right to discover the alleged informant's identity, a hearing to determine what sanctions, if any, should be imposed against the federal defendants and their attorneys for suppressing documentary evidence, and consideration of plaintiffs' outstanding discovery demands on remand; (and therefore found that the plaintiffs) were prevailing parties, (since) any other construction of the (Civil Rights Attorneys' Fees Award) Act would frustrate its basic rationale. Order of 12/12/79, at p.3(Appendix J)

The Court halved the Clark plaintiffs' lawyers' hours and rates and awarded them $72,215.00. The Court reduced by three-quarters the hours submitted by co-counsel and awarded $27,695.00, also at a rate of $40 per hour. The Court further ordered that the award was assessed against the defendants in their official capacities, two-thirds to be born by the ity and County, and one-third by the federal government. The defendants have moved for rehearing to challenge for the second or third time the Court's finding that plaintiffs had "prevailed" within the meaning of the statute and the case; and the United States of America has asked for leave to intervene, in order to challenge the granting of the fee award against the federal defendants in their official capacities.

III. REASONS TO DENY DEFENDANTS' PETITIONS

The defendants are asking this Court to review twelve separate issues, the majority of which are variously stated pleas for absolute immunity. Some of these are straightforward; others, such as the federal defendants' argument concerning the Supreme Court's holding in Butz v. Economu, and the state defendants' argument about good faith (Point VIII), are disguised as claims for qualified immunity. All the arguments are consistent, however, in that the proper standard for directed verdict, and the powerful, conflicting evidence introduced by the plaintiffs at trial are wholly ignored; throughout, the defendants discuss the evidence very selectively, in the light most favorable to themselves.

In their cluster of spurious immunity claims, the defendants not only disregard the weight of the strong factual record and the legal standards of directed verdict; they also attempt to evade the effects of the Court's holding that plaintiffs were denied a fair trial, and the opportunity to fully prove their case, therfore necessitating a new trial, even if the proof had been insufficient. In making these arguments, as the Circuit Court noted, the defendants seek to "expand radically the parameters which the Supreme Court has set for the doctrine of official immunity." Hampton II, at 631.

In Point III the state defendants seek absolute immunity for prosecutors Hanrahan and Jalovec for their role in the pre-raid planning conspiracy. They claim that all these defendants did was draft and authorize a search warrant, and that this was an advocacy function, immune under Imbler v. Pachtman, 424 U.S. 409 (1976). The Court of Appeals correctly found, however, that the plaintiffs had proffered enough evidence showing that these defendants engaged in a conspiracy in planning the raid, designed to eliminate the BPP and to otherwise violate the constitutional rights of the plaintiffs, and, that, as part of the planning, they knowingly obtained a fraudulent warrant. The Court therefore found that the plaintiffs had made out a prima facie case that these defendants had acted in an investigative, police capacity, a form of activity expressly excepted by this Court from the

*We have addressed the defendants' points, both in this section, and in the individual arguments in the following order: A=St. Defts.' Point III; B=St. Defts.' Pt. X; C=St. Defts.' Pt. V; D=St. Defts.' Pt. I; E=St. Defts.' Pt. IV; F=St. Defts.' Pt. VIII; G=St. Defts.' Pt. VI; H= St. Defts.' Pt. VII; I=St. Defts.' Pt. II; J=St. Defts.' Pt. IX; K=Fed. Defts.' Pt. II; and L=Fed. Defts.' Pt. I and St. Defts.' Pt. XI.

immunity doctrine set forth in Imbler, at p.430 fn.31.

In Point X these same state defendants, Hanrahan and Jalovec, seek absolute immunity under the rule of Barr v. Matteo, 360U.S. 564 (1959), for their role in the post-raid conspiracy, and for those post-raid acts not associated with their prosecution of the plaintiff survivors.* These acts consisted of a media blitz after the raid, which the Court found violated plaintiffs' First, Fifth and Fourteenth Amendment rights, as well as causing them extreme pre-trial prejudice with respect to the charges lodged against them by Hanrahan. The Court correctly held that such public statements were not immune under Imbler, since they were not part of the prosecutor's function. Nor is there a conflict with this Court's decisions in Paul v. Davis, 424 U.S. 693 (1976) or Barr v. Matteo, supra, because here the plaintiffs proffered sufficient evidence that they had suffered constitutional harm from these conspiratorial acts.**

In Point I the Internal Investigations Division defendants, police officers Mulchrone, Meade, Ervanian and Kukowinski, seek absolute immunity from 1985 and 1986 liability for their role in the cover-up. They portray themselves as administrative judges, performing a judicial function which they argue should entitle them to the absolute immunity afforded in Butz. To grant such immunity here, where the investigation was admittedly a "whitewash", with no hearing, adjudication or any other aspect of a judicial process, and where those seeking the immunity have no judicial autonomy whatsoever, would be a gross and totally unjustified extension of Butz, and would likewise effectively overrule this Court's holding in Pierson v. Ray, 386 U.S.

*The Court did find these defendants absolutely immune, under Imbler for those post-raid acts--obtaining indictments, presenting evidence to the Grand Jury and striking a deal with federal prosecutor Jerris Leonard--which it said attached to their advocacy function as prosecutors.

**In Point V the defendants argue that defendants Hanrahan and Jalovec should not be individually liable under §1983 for their actions prior to the raid, because they were acting as supervisors. In fact, the Court grounded its decision on the direct involvement of these defendants in the raid. They chose some raiders whom they knew had long records of brutality, and others who had an obvious revenge motive; they approved the timing of the raid and the weapons to be taken, Hampton II, at 627. The Court's decision therefore was not based on respondeat superior which is precluded in 1983 actions by Monell v. Department of Social Services, 436 U.S. 568 (1978), but on these defendants' direct supervisory involvement in the events.

547 (1967).

In Point IV the state defendants seek absolute immunity for the raiders for their involvement in the cover-up after the raid, on the grounds that some small part of the evidence upon which the Court relied in finding a prima facie case against them was based on their Grand Jury testimony. Their argument is based on dicta in Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1926), summarily affirmed, 275 U.S. 593 (1927) and an approving reference thereto in Butz, to the effect that witnesses should receive absolute immunity from liability based on their testimony. Even if this Court were to determine that this dictum is the law, it would not affect the decision of the Circuit Court, because the Court relied on much independent evidence showing these defendants' involvement in the post-raid conspiracy and their individual liability for post-raid acts,rendering the Yaselli argument doubly meaningless. Additionally, even if these defendants could not be liable for what they said before the Grand Jury, their testimony is admissable to prove the conspiracy, as long as there is proof of additional non-immunized overt acts by them, and such proof is plentiful.

* * * * * * *

In addition to these straightforward, if spurious, immunity pleas, several more of defendants' points likewise put forth concepts designed to absolve them of liability regardless of the facts and the evidence. Thus in Point VIII of the state petition, it is argued in the same breath that, on the one hand, because plaintiffs did not call certain defendants as witnesses, they therefore did not prove their bad faith; and, on the other, that their bald denials establish good faith as a matter of law. Defendants argue that the Court of Appeals wrongfully imposed on them the burden of proving good faith, because no case of their bad faith was made out. In point of fact, the Court quite rightly found that plaintiffs fully made out their claims of bad faith, thus properly shifting the burden to defendants to rebut this showing. As to those defendants not called by plaintiffs, the Court correctly found that the documents, admissions, and prior testimony

were enough for a prima facie case.* The Circuit Court also examined the proof under the test in Wood v. Strickland, 420 U.S. 308 (1975), and found that it satisfied plaintiffs' burden. Similarly, as to the defendants who did testify, the Court said it was for the jury to decide whether the raiders "shot Hampton deliberately after (the survivors) had left the bedroom." Hampton, at 625; and whether Hanrahan and Jalovec participated in a conspiracy by planning an illegal raid designed to eliminate the BPP, and a later post-raid conspiracy to cover up, and to unconstitutionally harass the plaintiffs. As the Court found, the defendants' denials only created jury questions. To claim that good faith has been established here is but another bold attempt to obtain absolute immunity for their acts.

The state defendants in Point VI argue that no racial or other class-based animus was proven against them, because they had never heard of COINTELPRO, and this was the only proof of such animus. The Court below correctly recognized that COINTELPRO as shown in the documents, constituted valid proof of conspiratorial motive, intent, and animus for the federal defendants who were acting under it. The Court relied on other proof showing animus in Hanrahan and other state defendants. This included Hanrahan's creation of a special Unit, pursuant to his politically motivated "war on gangs" whose primary function was to "investigate" the BPP and other black organizations; his admission that he planned the raid to counteract the BPP's "anti-police propaganda" and "further the image of law enforcement;" his unremitting post-raid publicity campaign, and prosecutorial attack on the surviving plaintiffs and the BPP; his approval of the tactics and timing of the raid itself in which the police officers under his command fired blindly through thin plaster walls at people who were asleep in bed, and inflicted beatings and racial abuse on the survivors while Fred Hampton lay before them on the floor in a pool of blood. The record therefore quite amply supports the Circuit Court's holding that there was sufficient proof of a "comingling of racial and political motives," (Id., at 623) to go to the jury on the issue of the state defendants' animus.

---

*See, e.g., the IID defendants' admissions that their investigation was a "whitewash," and was designed to suppress conflicting evidence; and the Court's finding that defendant Sadunas' conduct in misidentifying two crucial shotshells was enough to require the jury to determine whether it was a result of "conspiratorial design" or "professional incompetence." Hampton, at 629.

In Point VII the defendants make the ludicrous claim that the Court of Appeals, in holding that plaintiffs had sufficiently made out their claims of conspiracy under Sec. 1983, ruled in conflict with this Court's decisions in Chapman v. Houston Welfare Rights, ___ U.S. ___ 60 L.Ed. 2d 508 (1979), and Adickes v. Kress, 398 U.S. 144 (1970), because plaintiffs had not shown any violation of their substantive constitutional rights. The Court below correctly found that these defendants, both individually, and as part of the conspiracies, violated, inter alia, the plaintiffs' First, Fourth, and Fourteenth Amendment Rights and these conclusions are convincingly supported by the record. Chapman, where the plaintiff sought simply to vindicate a right under the Social Security Act, with no claim of constitutional deprivation, has absolutely no applicability here. The defendants/seek reversal of Adickes which strongly supports the in fact, plaintiffs, and to bar conspiracy claims under 1983 altogether. Such a claim cannot be supported, by Chapman, or any other precedent of this Court.

In Point II the state defendants also raise the issue of whether the Circuit Court was correct in ordering Defendant Groth to reveal, under protective order, the identity of his alleged informant. In raising this argument, the defendants again ignore the evidence proferred by plaintiffs and relied upon by the Court. This evidence showed that four of the six key planners of the raid have at some time or another admitted that Groth had no separate informant, thereby establishing the strong possibility that Groth perjured himself in the warrant affidavit. The defendants also ignore the Circuit Court's painstaking and correct application of the balancing test established by this Court in Roviaro v. United States, 353 U.S. 53 (1957); its finding that revelation of this alleged informant (or the revelation of his non-existence) is "essential to a just determination of the plaintiffs' case," specifically their 4th Amendment, conspiracy, and bad faith claims, and the careful limitation of its holding to the unique and compelling facts of this highly significant case. Despite the careful analysis of the Court of Appeals, the defendants spuriously argue for application of the test in Franks v. Delaware, 438 U.S. 154 (1978). The test developed in Franks was designed by this Court to set guidelines for determining when a criminal/defendant may "go behind" a search warrant on the issue of probable cause. But, even if the standard and rationale of Franks is grafted onto the Roviaro test, as the defendants ask, the Court's decision below is enhanced

rather than undermined, since the "independent" portion of Groth's warrant is supported only by "misrepresented triple hearsay," (Hampton, at 538) allegedly supplied by an informant (O'Neal) who the evidence at trial showed was "unreliable" under existing laws. Further, these very state defendants admitted at trial that they knew when drafting the warrant that the "O'Neal information," by itself, was insufficient to establish probable cause. Additionally, the rationale behind Franks, i.e., guarding against perjured warrants by police officers is certainly served by the Circuit Court's decision.

* * * * *

In a claim which is perhaps not as outrageous, but equally as spurious as the others, the state defendants argue in Point IX that the en banc procedure of the Seventh Circuit conflicts with 28 USC 46 and the norms of this Court because two active judges recused themselves from consideration of defendants' rehearing petitions. Defendants assert that those judges should have voted at least on the question of rehearing despite their recusal or, in the alternative, that they should have been replaced for that vote by judges from outside the Circuit. These arguments are without merit. It would defeat the very purpose of recusal for a disqualified jurist to vote in the case from which he or she had withdrawn. As to defendants' alternative argument, the language of 28 USC 46 expressly forbids judges from outside the Circuit to vote on rehearing petitions.

In fact, a statutory quorum of the majority of judges in regular active service on the Seventh Circuit voted on and rejected defendants' petitions for rehearing. The procedure followed below, which should be left to the sound discretion of the Circuit Court, provided the defendants with full consideration of their petitions and violated no statute or norm set by this Court.

* * * * *

The federal defendants, by arguing for application of the qualified immunity of Butz v. Economou in the circumstances of this case are in reality insisting on absolute immunity for their actions. At the heart of their argument is the outrageous premise that their bald denials of unconstitutional conduct must be accepted as true, regardless of the proof which is introduced against them; and that these denials, as a matter of law, insulate them from a jury

determination of their fate. As the Circuit Court found, the plaintiffs introduced a prima facie case, with some of the most damning evidence coming from the defendants' own files, that the FBI defendants participated in a conspiracy to eliminate the BPP as "a vital, radical black political organization," as part of their illegal COINTELPRO program. As part of the conspiracy, and with unconstitutional motive and intent, they instigated and participated in the planning of the December 4th raid, by, inter alia, having five to seven pre-raid conversations with the state defendants and supplying the most crucial instrumentality of the raid itself--the floor plan. They internally ratified their own crucial role in the raid and its unconstitutional, lethal result, after the fact, covered up their role in federal and state investigations, and continued this cover-up at least through the trial itself. Despite this powerful evidence which strongly contradicts their denials, despite the law of this Court which instructs that the issue of motive and good faith is singularly one for the jury, and despite the holding of the Court below, unchallenged here, that they and their lawyers suppressed evidence and obstructed justice during the proceedings in the trial court, these defendants still claim that they are to be excused from any liability or obligation to answer for what they did.

These defendants would strip the rule set down in Butz of all its meaning in order to gain absolute immunity for their conduct. Their argument, as dangerous as it is ingenuous, must be soundly rejected.

* * * * * * *

Both the federal and state defendants also challenge the Circuit Court's award of $100,000 in attorneys fees to plaintiffs, claiming that the plaintiffs were not prevailing parties. The state defendants further argue that the award inhibits their "access to the Courts," and that the plaintiffs were not acting "in the public interest." The Court below correctly found that the plaintiffs had "succeeded on a significant issue" in the course of this litigation; and thereby awarded interim fees. The Circuit Court's determination that the plaintiffs have "prevailed" is in complete conformity with the express legislative history of the Civil Rights Attorneys Fees Award Act, which provides that interim awards are "particularly important in protracted litigation," and may be granted "where a party has prevailed on an important matter in the course of litigation." (H.R. Rep. No. 94-1558 94th Cong. 2nd Sess. 8, S. Rep. No. 94-1011

94th Cong. 2nd Sess.) Here, after ten years of litigation, the plaintiffs have been awarded fees for the work on this appeal. By prevailing on discovery issues, obtaining a sanctions hearing, and assuring that the case will be decided by a jury, theplaintiffs have indeed succeeded on significant issues. Further, while ultimate liability has not yet been established, the Court of Appeals has found that the defendants have violated federal law by obstructing justice and disobeying court orders, and the defendants have not challenged that finding here. Likewise, the Court determined that plaintiffs presented "serious evidence of gross state and federal misconduct." Hampton II, at 638-39. Further, the plaintiffs and their lawyers were forced to endure a bootless and agonizing trial, fatally and obviously flawed from its very inception, largely, as the Circuit Court found, because of the defendants' "dilatory" and "obstructionist" tactics. Plaintiffs were then required to litigate a massive appeal, on issues primarily the product of government misconduct, simply to recover their elementary right to a fair trial.

Additionally, this is a case of extreme importance and significance, both in Chicago and nationally. Those government officials with a sworn obligation to vindicate the rights of the plaintiffs and the public, are either defendants herein or have abdicated their responsibilities--leaving only the efforts of plaintiffs' lawyers, who have fought without compensation for ten years to unearth the whole truth concerning December 4th and bring it to the public. Conversely these defendants have been represented by lawyers paid by public funds--with over 2.1 million dollars already spent for their defense. It is therefore hard to imagine a more appropriate circumstance for the Circuit Court to have followed the express legislative intent of 42 U.S.C. 1988 in granting interim fees.

Despite the long petitions filed by the defendants' lawyers, who will no doubt collect handsomely for their work, they raise no issues worthy of this Court's review, as we will more completely demonstrate in our arguments below.

IV. ARGUMENT

A. THE CIRCUIT COURT BELOW CORRECTLY APPLIED THIS COURT'S HOLDING IN IMBLER V. PACHTMAN TO THE EVIDENCE ADDUCED AT TRIAL, FINDING THAT THE ACTIONS OF DEFENDANTS HANRAHAN AND JALOVEC IN PLANNING AN UNCONSTITUTIONAL RAID, AND OBTAINING A FRAUDULENT WARRANT WAS AN INVESTIGATIVE RATHER THAN ADVOCACY FUNCTION.

The Defendants urge that "the decision below is contrary to the express and implied ruling in Imbler v. Pachtman and its progeny," (state defendants, Point III)* and disingenuously pose the issue as whether defendants Hanrahan and Jalovec should have absolute immunity for "authorizing, drafting and/or reviewing the application for the search warrant. Whatever the status of such acts by a prosecutor, the plaintiffs did not make such limited allegations, and the proof presented at trial cannot be so narrowly construed. The Court of Appeals, in its earlier decision, held that

> The conduct of Hanrahan and Jalovec in planning the raid may be described in various ways. At one extreme the complaints may be read to charge that they deliberately planned to have the police officers kill Hampton and Clark. Even without the allegation of improper political or racial motivation, it is plain that no immunity would apply under that reading. Regardless of his motives, the prosecutor certainly may not order subordinates to kill or to punish a free citizen without trial. Notwithstanding the tone of these complaints, however, appellants have not urged this extreme reading on the court; we therefore do not so interpret that allegations. At the other extreme, defendants Hanrahan and Jalovec argue that they are charged with nothing more than the drafting of a search warrant which the raiding officers executed, an act which should be acepted as a traditional duty of the Attorney for the County. But we are persuaded that the planning allegations cannot fairly be read so narrowly. At the very least they charge that Hanrahan and Jalovec planned a raid in order to obtain evidence of criminal activity. Defendants argue that evidence gathering is so closely related to the presentation of evidence at trial that it should also be clothed with immunity. We find this argument unpersuasive. Even though defensible if conducted in good faith with probable cause, the State's Attorney's alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under his direction.

Hampton v. City of Chicago, 484 F.2d 602, 608-09 (7th Cir. 1973), cert. denied. 415 U.S. 917 (1974). (Hampton I).

---

*Defendants' issue presented for review is:

"Whether a prosecutor is absolutely immune from liability for acts done in authorizing, drafting and/or reviewing the application to a court for a search warrant, and necessary attendant acts performed within the scope of his duties and his prosecutorial capacity to carry out the order of the court commanding the search?"

In Hampton II, after a careful examination of the record, the Court held that the evidence presented supported its earlier conclusion that these prosecutors were not acting in a quasi-judicial capacity:

> In Hampton I, supra, we examined the claim of Hanrahan and Jalovec to absolute immunity for their pre-raid conduct. We concluded that their:
>
> 'alleged participation in the planning and execution of a raid of this character has no greater claim to complete immunity than activities of police officers allegedly acting under (their) direction.'
>
> Hampton I, supra, 484 F.2d at 609. Neither Imbler, supra, nor our fuller consideration of the issue aided by the evidence produced at trial alters that conclusion.

The Court concluded that the plaintiffs had presented a prima facie case that these prosecutors, in "instigating and preparing for the raid," had participated in a conspiract "to subvert and eliminate the BPP and its members," and that a reasonable jury could find that they and their co-defendants "agreed at least tacitly to work together to eliminate the BPP." Hampton II, at 623, 624. This conduct certainly was not and could not be protected by absolute prosecutorial immunity.*

The evidence presented at trial refutes the contention that these defendants were acting in an advocacy role, and supports the decision of the Circuit Court. The evidence definitively establishes that the defendants were participating in the planning of the raid, in which application for the search warrant was just one aspect; and generally that they were acting as police officers, at the outer reaches of even an investigatory function. The evidence showed that Hanrahan had created a special squad of nine police officers who were "detailed" to his assistant, Jalovec, who he had made chief of his "Special Prosecutions Unit" (SPU). Hampton II, at 610. He and Jalovec personally selected many of these officers, all of whom later went on the raid, after reviewing their police backgrounds. (Tr. 24831-4, 26055, Pl. #409) Several of the officers had extensive police disciplinary records. Defendant James

---

*As an additional basis for liability against their prosecutors for their pre-raid actions, the Court held that plaintiffs had made a sufficient case to go to the jury under §1983 against these defendants as supervisors who actively participated in the raid preparations; under §§1983 and 1985 for certain post-raid actions; and under 42 U.S.C. §1986 for failure to prevent the implementation of the §1985(3) conspiracy. Hampton II, at 626, 627. (See Argument C , infra.)

"Gloves" Davis, who led the charge through the front door of the apartment, killed Mark Clark, and repeatedly fired his automatic rifle through the walls of the apartment, had 66 prior disciplinary complaints, a judgment against him for brutality, and a well-deserved reputation--which defendant O'Neal conceded--of "terrorizing the black community." (Pl. #580-94, Tr. 29993-94, 29653).

This elite unit was headed up by defendant Groth, who answered directly to Jalovec. It was created by Hanrahan to implement his publicly announced "war on gangs," and, in sharp contrast to the "routine matters"--such as serving subpoenas and locating witnesses in pending court cases--normally handled by police officers assigned to the State's Attorney's office, SPU carried on straight police investigative work in the black community. (Pl. #409, 413; Tr. 24943) Its investigative targets included the BPP (Tr. 24971), and Hanrahan conceded that one of its main purposes was to "sell the public" on supporting the police. (Tr. 27020). Defendant Mitchell testified that he understood one of Jalovec's main duties was to gather "intelligence" on the BPP. (Pl. #422) According to Groth, Jalovec gave almost all of the work assignments Groth never did anything without Jalovec's knowledge, and Jalovec authorized payments for SPU informants. (Pl. #413) Groth and Jalovec answered directly to Hanrahan.

The evidence also showed that Hanrahan and Jalovec both participated in planning the raid. Jalovec had five to seven meetings and conversations with Mitchell concerning the Hampton apartment in the week prior to the raid. Hampton II, at 611, fn. 12. He met with Mitchell and Groth just prior to the raid and Mitchell supplied them with the layout of the apartment; (Id.) and the Court of Appeals found that the "communications between Jalovec and Mitchell, in particular, were essential to the planning and successful execution of the raid." (Id., at 624)

Jalovec arranged for the machine gun which was taken on the raid, and discussed and rejected the possibility of making the raid at 8:00 p.m., when the apartment would be empty. (Pl. #413, Tr. 25174-75, Hampton II, at 612) Jalovec "wholeheartedly" approved of changing the time to just before dawn so that the raiders could "surprise the occupants while they were asleep." (Tr.

24527, 25448-49, 24547) He had numerous conversations with defendant Groth, and they drafted the affidavit for the search warrant together, alleging that Groth had his own informant, although the plaintiffs presented evidence that Groth, Jalovec, Hanrahan and Mitchell all were aware that this averrment was false and perjurious. (Pl. #83, 91, 413, Hampton II, at 637-38) It was Jalovec who decided that Mitchell's name would not be used in the warrant; and he was "more than likely present" when Groth went to the men selected to make the raid, and explained it to them. (Tr. 25391) He also arranged for the assignment of several additional officers from another police unit to fill out the raiding party. (Tr. 23612-16)

Jalovec and Groth admitted meeting twice with Hanrahan on December 3rd. At the first meeting, they discussed with Hanrahan all the information which they had on the apartment, including the fact that Hampton was an occupant, and that he purportedly kept a .45 there. Groth had the layout of the apartment with him at this meeting, and said he "may have" discussed the timing with Hanrahan. (25241-46) Jalovec informed him of the number of men assigned to the raid, that Groth was assigned to lead it, and had surveilled the premises. Hanrahan was also informed that the GIU* had planned a raid and then called it off, and that, "at least inferentially," such information from the FBI informant in the Panthers would not be offered again if Hanrahan failed to act upon it. (Tr. 27256-58, 27261-2) Groth testified that he left this meeting with the "distinct impression," that Hanrahan had "approved of the raid." (Tr. 25241-46, Hampton II, at 611-12)

After this meeting, the time for the raid was changed from 8:00 p.m. on December 3rd, to 4:30 a.m. on December 4th. Groth and Jalovec then drafted the warrant affidavit and Jalovec took the warrant to Hanrahan for approval, detailed the final plan for the raid, and Hanrahan said he should "tell the men to be careful." (Tr. 24529, Hampton II, at 612) Groth then took the warrant to Judge Robert Collins, Hanrahan's former First Assistant U.S. Attorney and Jalovec's former supervisor in that office.** At no time did Groth, Javlovec or Hanrahan discuss the possible use of teargas, floodlights, loudspeakers or other

*Gang Intelligence Unit of the Chicago Police Department (GIU).

**Prior to becoming Cook County State's Attorney in 1968, Hanrahan was the the U.S. Attorney for the Northern District of Illinois.

non-violent means of executing the purported warrant. (Tr. 24529, Hampton II, at 612) Hanrahan admitted that he was aware that two of the men who were assigned to the raid had been close personal friends of two policemen slain the month before in a gun battle in which an ex-Panther was also killed, and further, that one of the main reasons for approving the raid was to combat the "anti-police propaganda" of Hampton and the BPP. (Tr. 27042-6,028, 069-72)

The raid itself is further evidence of Hanrahan's and Jalovec's deep involvement in police activity over and above the mere drafting of the search warrant, and goes far beyond their advocacy function as prosecutors. Plaintiffs' evidence showed that the police, at 4:30 in the morning, did indeed "surprise" the sleeping plaintiffs. They fired 99 shots from the machine gun, an automatic rifle, pistols and shotguns. Defendant Davis killed Mark Clark and fired his carbine through walls into the rooms where the occupants slept. One of his bullets was found in Hampton's body. Hampton II, at 615 Carmody, who Hanrahan knew was close to one of the recently slain officers, entered at the back and killed Hampton. Hampton II, at 614, 625 Hampton, who never used drugs, was killed in bed, while asleep or semi-conscious, under the sedation of a large quantity of seconal. (Tr.21212-398; 23150) Officer Gorman fired several rounds through the walls with the machine gun, shooting around the figure of plaintiff Brenda Harris, who sat terror-stricken on a bed in the living room. (Tr. 18802, Hampton II, at 615) Three of the survivors were seriously wounded by machine gun fire while lying on the floor, and plaintiff Satchell suffered four wounds which required removal of a large portion of his colon. (Pl. #DW2-6, Hampton II, at 614) The pattern of the bullets unmistakably showed that firing from the back, the front, and the inside hallway converged on the spot marked on the floor plan as Hampton's bed, the same blood soaked bed from which defendant Carmody admitted he dragged Hampton's body after the shooting. (Pl. #RZ135, 21, Hampton II, at 614) When the shooting stopped, the plaintiffs were forced to walk out, despite their serious injuries, and were physically and verbally abused. (E.g., Tr. 12189, 12205, 17825, Hampton II, at 614) No tear gas, flood lights, loudspeakers, or other non-violent methods were used to obtain plaintiffs' surrender before the police opened fire.

A reasonable jury could certainly determine that defendants Hanrahan and Jalovec, by their deep involvement in the preparations for this frighteningly violent and murderous operation, had indeed been part of an unprecedented unconstitutional conspiracy by officers sworn to uphold the law. When viewed together with plaintiffs' evidence concerning these defendants' actions and statements after the raid, an even stronger case for denying absolute immunity is made.* On the morning of December 4th, Hanrahan and Jalovec had the seized weapons brought directly to their office rather than to the police crime lab, which was the normal practice. They then staged an elaborate press conference, in which Hanrahan displayed the weapons, falsely accused Hampton of firing three shots from a .45 pistol at the police officers, and completely ratified the sadistically unconstitutional results of the raid, asserting that his men had acted with good judgment, professional discipline, and considerable restraint. Hampton II, at 616 He has continued to uphold their conduct in the raid to this day. He and Jalovec both actively masterminded and implemented an all-out campaign, designed to give maximum exposure and credibility to the defendants' false version of the raid, and to hopelessly prejudice the survivors, whom he had charged with attempted murder. Id., at 626-27 This campaign included three major press conferences,

This campaign included three major press conferences,

an exclusive front page story given to the Chicago Tribune in which raiders told their story, complete with pictures furnished by the defendants which the article falsely claimed depicted evidence of Panther firing,** and a carefully staged and rehearsed television "reenactment" on CBS. Hampton II, at 616-18. He initiated a "whitewash" police IID investigation, actively solicited and used a false ballistics report which supported the defendants' version of the events, and obtained indictments based in large measure on that report. (Pl. #409, Hampton II, at 618, 620) He refused to dismiss the indictments for months after the FBI informed him of the mistake, and finally dismissed them only after the federal prosecutors promised him in return that he and his officers would not be indicted. (Pl. #24, Hampton II, at 619-20)

---

*These post-raid actions constitute evidence of both their consciousness of guilt in planning the illegal raid, and their involvement in the post-raid conspiracy to cover-up. (See Argument B, below)

**One picture had several holes circled and labelled as evidence of Panther firing. Further examination of the apartment showed the "bullet holes" to be nail heads. The other picture showed a bullet-riddled door and claimed to be evidence of firing by the plaintiffs in the front bedroom. In fact, it was the door which had been riddled by "Gloves" Davis' carbine. (PL EVH2A,B)

By May of 1970, Hanrahan disbanded his unique police Unit, and the defendant raiders were returned to regular police assignments.* (Pl. 3409)

* * * * * * *

Plaintiffs' evidence, viewed in the light most favorable to them, clearly establishes much more than the simple drafting and approval of a search warrant, and places these defendants far beyond the boundaries of their "advocacy function." In fact, it shows that they far exceeded even a legitimate police function. The defendants' claim that they were merely drafting and approving a search warrant is their defense. Since it is sharply contradicted by the plaintiffs' evidence, the Court of Appeals was entirely correct in holding that they were not entitled to absolute immunity, or a directed verdict.

The defendants rely heavily on the recent case of Forsyth v. Kleindeinst, 599 F.2d 1202 (D.C. Cir. 1979), claiming that its holding conflicts with the decision here. The defendants claim that Attorney General John Mitchell's action in placing a warrantless wiretap on Forsyth's telephone is analagous to their obtaining the search warrant, which, therefore, according to Forsyth, should be considered as part of the prosecutor's "quasi-judicial" function which is absolutely immune. This argument is wrong for several reasons. First, the Seventh Circuit's decision in Hampton I, as reaffirmed in Hampton II, was expressly based on its interpretation of the defendants' actions as much broader than the simple drafting and approval of a search warrant. Hence, even if the Court in Forsyth did find that absolute immunity attached to authorization of a warrantless wiretap, and even if that were the same as drafting and approving a warrant, Forsyth would not contradict the Seventh Circuit's decision. Forsyth, however, held no such thing. The Court simply remanded the matter to the District Court for additional fact-finding, in order to determine whether in fact the Attorney General acted in an investigative/administrative role, or an advocacy role, in approving the tap; and

*The federal Grand Jury Report, issued that same month, urged that "the state's attorney's office should discontinue or minimize the use of police assigned to it for normal police functions..." (FGJ Rpt., p. 116-17)

the case thus cannot be said to conflict in any way with the Seventh Circuit's holding, and in fact cites Hampton I with approval. Additionally, it is by no means clear that even the mere drafting and approving of a search warrant is protected by the narrow holding in Imbler, since that is so clearly an investigative activity. In any event, where the claim and the evidence are that the warrant was knowingly drafted, approved, and obtained on a perjured affidavit, the case would be controlled by the express exception in Imbler, of an almost identical factual situation in a case where the plaintiff alleged that prosecutors conspired with the police to fraudulently obtain a warrant. Guerro v. Mulhearn 498 F.2d 1252, at 256 (1st Cir. 1974), as cited in Imbler, at 430, fn. 31.

In essence, as shown by the plaintiffs' proof, the defendant prosecutors here were acting as police, and in conspiracy with police. The drafting of the warrant was but one aspect of the planning of the raid--a necessary pretext and instrumentality. The evidence showed that these defendants directed, assisted, and approved not only the search warrant but the raid itself, a raid which was planned with unconstitutional motive and intent, rather than for legitimate law enforcement purposes, and whose results were not only the seizure of evidence but also unconstitutional death, injury and arrest.

In Imbler, this Court expressly excepted Hampton I. Imbler v. Pachtman, supra, at 430, fn. 31. As Justice White noted in his concurrence, a prosecutor is not absolutely immune for initiating an unconstitutional arrest, again citing Hampton I as an important example. Imbler, at 441 (fn. 6) Other Circuits have found that similar, less egregious acts by prosecutors are similarly not covered by absolute immunity, and many of these cases were likewise expressly left standing by the Court in Imbler.*

*E.g., Guerro v. Mulhearn, supra; Apton v. Wilson, 506 F.2d 83 (D.C. Cir. 1974) (Justice Department prosecutors not absolutely immune from suit for directing arrests of demonstrators. See also Baustrieri v. Warren, 314 F. Supp. 324 (W.D. Wisc. 1970) (Prosecutors who entered bar, carded people, checked liquor supplies, and closed the bar down not immune); Robichaud v. Ronan, 351 F.2d 533 (9th Cir. 1965); Lewis v. Brautigan, 227 F.2d 124 (5th Cir. 1955). See also, Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. (1977).

The plaintiffs, after discovery and presentation of their proof at trial, have now established an even stronger case to defeat immunity than was first examined by the Circuit Court in Hampton I, and reviewed by this Court, both on the subsequent petition for certiorari, and in Imbler itself. The plaintiffs have now presented a prima facie case that the defendants planned, approved and directed a police raid, with police officers personally selected and assigned to their command, that as part of that planning they obtained a search warrant based on perjured testimony, and that the raid which they planned and approved resulted in unconstitutional, politically and racially motivated killings and injury, arrests, and seizure of evidence.* Further, these defendants publicly applauded and ratified the result of the raid, while attempting to cover up its true character.

It is hard to imagine a factual setting less appropriate for the application of immunity. To so hold would unreasonably and illogically extend Imbler, and effectively eradicate §1983 actions against prosecutors, no matter how unrelated their actions are to legitimate advocacy functions, or how heinous the result of their actions. Clearly, this Court should deny certiorari on this issue.

---

*As the Circuit Court put it:

> These defendants (Jalovec, Hanrahan, the federal defendants and the raiders) also engaged in an extensive series of communications which could demonstrate to a reasonable person the existence of an agreement--either tacit or express to achieve their shared objective--inflicting injury to the BPP." Hampton II, at 624

B. THE CIRCUIT COURT CORRECTLY HELD THAT THE PLAINTIFFS PROVED A PRIMA FACIE CASE OF VIOLATION OF THEIR CONSTITUTIONAL RIGHTS BY THE DEFENDANTS' POST-RAID PUBLICITY CAMPAIGN; AND FURTHER THAT THIS CAMPAIGN WAS NOT PART OF A PROSECUTOR'S ADVOCACY FUNCTION.

in Point X
The state defendants argue that "Public Officials Have a First Amendment Right to Respond to Accusations of Misconduct,"* and that defendants Hanrahan, Jalovec, and the raiders should thus be immune from suit for the publicity barrage they carried on after the raid, under the rule of Paul v. Davis, 424 U.S. 693 (1976), and Barr v. Matteo, 360 U.S. 564 (1959). They claim that the Circuit Court makes the T.V. reenactment and the Tribune exclusive "in themselves actionable;" but the Court of Appeals correctly found that Barr and Paul do not apply, because the defendants' "publicity campaign" did not simply defame the plaintiffs, as was the case in Barr and Paul, but violated "specific statutory and constitutional rights," both as part of the conspiracy, and individually under 1983. Hampton, at 632, 627-28. Among these rights were plaintiffs' First Amendment right of political thought and expression, which the evidence showed was powerfully chilled by the defendants' conspiratorial actions; their right to be free from harassment and public attack because of their political affiliation, especially where false claims are used in the attack, as guaranteed by the First and Fourteenth Amendments; their right to seek redress, including the pursuit of this litigation; and the right to be free from false arrest and malicious prosecution, as protected by the Fifth and Fourteenth Amendments. Therefore here, as the Circuit Court correctly held, the plaintiffs established a prima facie case that the defendants' publicity campaign directly caused several egregious violations of the plaintiff-survivors' constitutional rights, and the defendants' liability must then be determined by a jury under the standards of qualified immunity reaffirmed by this Court in Butz.

---

*Defendants assert the issue for this Court is:

> "Whether a prosecutor, or a policeman who served a warrant, may be held liable under 42 U.S.C. §1983, et seq., for public statements made after arrest, concerning the service of a seach warrant, use of weapons, resistance, description of the physical evidence seized, and substance of the charges, in response to prior instant public accusations of murder made against them, without evidence that those statements were an imminent threat to, or reasonably likely to interfere with, or did prejudice a fair trial of those arrested?--Especially where no trial of the charges was ever had?"

The defendants also argue that they had a First Amendment Right, especially as to Hanrahan, to act as they did, because they were public officials, trying to answer unfounded charges of murder, and to stem post-raid "violence in the community." No one has a First Amendment Right to violate the constitutional rights of others, no matter what they are allegedly responding to. There was no post-raid violence in the community, in point of fact, except for another pre-dawn police raid the next morning, at the home of Panther leader Bobby Rush. Further, the evidence showed that Hanrahan rather than the Panthers started the media blitz, and the fact that Hanrahan and Jalovec ordered the seized weapons be brought to the State's Attorney's office for show, rather than the Crime Lab for proper testing tends to show it was planned in advance. Finally, Hanrahan's publicity-seeking far exceeded the limitations placed upon a prosecutor by the Canons of Ethics, and was carried on with full knowledge of its extremely prejudicial effect upon the criminal cases of the survivors, and in fact served to inflame, rather than to calm public sentiment. This argument by the defendants turns the constitution completely on its head.

Hanrahan and Jalovec also complain that the Court of Appeals erred when it held that they were not entitled to absolute prosecutorial immunity for the publicity blitz. They argue that the Court's holding is in conflict with this Court's opinion in Imbler v. Pachtman, 424 U.S. 409 (1976), and with the decisions of the Courts of Appeals in Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1968); Ledwith v. Douglas, 568 F.2d 117 (8th Cir. 1978); and Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975). (St. Pet, at page 75.) Here they ignore the distinction recognized in pre-Imbler and post-Imbler cases, as well as Imbler itself, between advocacy and investigation/administration. The Court of Appeals closely analyzed the defendants' post-raid conduct in light of Imbler and Butz and held that some of their actions fell within the ambit of Imbler's protection and some did not. Thus, the decision to file charges against the survivors of the raid, the presentation of evidence before the state grand jury, and the "deal" with Assistant Attorney General Jerris Leonard, were actions found to comprise part of the quasi-judicial duties of a state prosecutor, and were held to be immune. 600 F.2d, at 632.

Other post-raid actions were found not to warrant absolute immunity. The Court found that the defendant prosecutors' generation of post-raid publicity was not intimately associated with the judicial phase of the prosecutorial function and thus not entitled to absolute immunity. 600 F.2d, at 632, 633. The Circuit cases cited by the defendants do nothing to further their argument. In each cited case, the actions of the prosecutor complained of were intimately associated with the judicial phase of the prosecutor's function. See, Prince v. Wallace, 568 F.2d 1176 (5th Cir. 1978) (complaint for deprivation of right to speedy trial); Ledwith v. Douglas, 568 F.2d 117 (8th Cir. 1978) (initiating deceptive practices action and serving the complaint); and Tyler v. Witkowski, 511 F.2d 449 (7th Cir. 1975) (decision on whether to continue criminal prosecution after retraction of key witnesses' testimony). Simply because the Court of Appeals held that the defendants were not entitled to absolute immunity for all their post-raid actions does not place its opinion in conflict with these cases. In fact, the decision of the Court of Appeals here is fully consistent with the cases cited by the defendants, since each applies a functional anaylsis to the actions of the prosecutor involved. Further, the Court of Appeals' opinion is consistent with those cases which have held that absolute immunity does not exist for actions taken by prosecutors which are not intimately associated with the judicial phase or are not undertaken in the prosecutor's role as a legal advocate for the State--such as publicity which occasions unconstitutional harm. See, e.g., Butz v. Economu, supra, Helstoski v. Goldstein, 552 F.2d 564 (3rd Cir. 1977); Briggs v. Goodwin, 569 F.2d 10 (D.C. Cir. 1977), cert. denied 437 U.S. 904 (1978); c.f., Harris v. Harvey, 605 F.2d 330 (7th Cir. 1979).

The opinion of the Court of Appeals represents a proper application of existing law, and no reason exists for this Court to review its decision on the question of these defendants' post-raid immunity. The petition for certiorari should be denied.

C. THE DECISION OF THE CIRCUIT COURT DOES NOT CONFLICT WITH MONELL V. DEPARTMENT OF SOCIAL SERVICES OR WITH THE DECISIONS OF OTHER CIRCUITS BECAUSE IT IS BASED ON EVIDENCE OF DIRECT SUPERVISORY PARTICIPATION BY DEFENDANTS HANRAHAN AND JALOVEC, RATHER THAN ON ANY THEORY OF VICARIOUS LIABILITY.

The state defendants claim that "The decision of the court below conflicts with this Court's decision and that of the Fifth and Tenth Circuits on the issue of liability of a supervisor for the alleged constitutional torts of a subordinate under 42 U.S.C. §1983, et seq.," (Point V)* They claim that the Seventh Circuit's holding, that the plaintiffs made out a prima facie case against defendants Hanrahan and Jalovec under 42 U.S.C. 1983, conflicts with this Court's decision in Monell v. Department of Social Services, 436 U.S. 568 (1978), and several circuit cases, because it is purportedly based solely on a theory of "vicarious liability." Nothing could be further from the truth. The Circuit Court held, based on the evidence, that the plaintiffs had established a sufficient case that these defendants had failed to properly supervise the raiders, based upon the evidence of their actual supervisory activities, as described above in Point A, with respect to the preparations for the raid; and also including their instructions concerning evidence-gathering, given to the officers at the apartment by telephone directly after the raid, which led to the destruction and spoilation of evidence. These facts, as the Court found, established sufficient personal notice and personal and direct supervisory participation for a jury to determine these defendants' personal liability, based on whether the raiders' actions were reasonably foreseeable. Hampton II, at 627. See also Sims v. Adams, 537 F.2d 829, 831 (1976).

These defendants' liability under §1983 is further strengthened by their direct personal participation in planning the raid and drafting and approving the search warrant, evidence which standing alone establishes a §1983 claim against the defendants. In fact, in the very case upon which the defendants purport to rely, the Court held that when a supervisory sheriff participated in obtaining warrants and planning a raid in which to serve them, but did not personally participate in the unconstitutional raid itself, it is for the

*Defendants say the issue is "whether liability exists under 42 U.S.C. §1983, et seq., without evidence of actual knowledge of the alleged wrongful conduct of subordinates? May a person be held liable for the alleged constitutional torts of another only because he is the supervisor of the latter?"

fact finder to determine whether the sheriff violated 42 U.S.C. §1983. Baskin v. Parker, 602 F.2d 1205 (5th Cir. 1979) (en banc).

The Court's decision that these defendants must go to the jury on their §1983 liability is therefore grounded not in theories of vicarious liability, but rather on hard evidence of notice, and active participation in the actual direction and supervision of these defendants on this raid. This holding is therefore in complete harmony with Monell and the decisions of the Fifth and Tenth Circuits, as well as prior decisions by the Seventh Circuit; and this argument therefore raises no question worthy of review by this Court.*

D. THE CIRCUIT COURT'S DECISION THAT CERTAIN POLICE DEFENDANTS SHOULD BE AFFORDED QUALIFIED IMMUNITY FOR THEIR PARTICIPATION IN AND FAILURE TO CORRECT A SHAM POLICE INVESTIGATION IS TOTALLY CONSISTENT WITH THIS COURT'S DECISION IN BUTZ V. ECONOMOU SINCE THEY WERE ACTING IN AN INVESTIGATIVE RATHER AND AN ADJUDICATIVE CAPACITY.

The defendants claim that "the decision below conflicts with this Court's decision affording absolute immunity for adjudicative functions." (Point I)** They claim that certain police officer defendants, assigned to the Internal Investigation Divison (IID) of the police department, are absolutely immune under this Court's decision in Butz v. Economou.

The Court below found that the plaintiffs had made out a prima facie case against certain of these police defendants--Meade and Mulchrone--as participants in the 42 U.S.C. 1983, 1985(2), and 1985(3) post-raid conspiracy

*The defendants, in footnote * on page 61, imply that the Court erroneously sanctioned a negligence theory of recovery here, and that Procunier v. Naverette, 434 U.S. 555 (1978) precludes this. The Court disposed of this argument in its opinion stating:

> Defendants urge that plaintiffs be denied relief on the ground that negligent conduct is not cognizable under section 1983. We are not persuaded by this argument. Defendants are correct that "mere negligence" is not actionable under 42 U.S.C. §1983. Bonner v. Coughlin, 545 F.2d 565, 567 (7th Cir. 1976), cert. denied, 435 U.S. 932, 93 S.Ct. 1507, 55 L.Ed.2d 529 (1978). In Jamison v. McCurrie, 565 F.2d 483, 486 (7th Cir. 1977), Chief Judge Fairchild articulated the standard for a constitutional cause of action: "The plaintiff must show that (the police officers') misbehavior was either intentional or in reckless disregard of his constitutional rights," citing Bonner v. Coughlin, supra. The evidence offered by plaintiffs, however, viewed in the light most favorable to them, satisfies this test. Hampton II, at 625, fn. 25.

Further, Procunier expressly left open the question of whether mere negligence is actionable.

**Defendants say that the issue is "whether municipal officials have absolute immunity from liability under 42 U.S.C.§1983, et seq., for quasi-judicial acts performed during an internal police disciplinary hearing when acting within the scope of the exercise of statutory duties?"

to harass the survivors of the raid, to conceal the facts surrounding the raid," and "to continue an unfounded prosecution against the plaintiffs." Hampton II, at 627, 628, 629. Specifically, the Court found that these defendants' "actions reasonably could have been found to have encouraged the continuation of the unfounded prosecution by suppressing the development of inconsistent evidence against the raiders, Hanrahan and Jalovec." Id., at 629. As to defendants Ervanian and Kukowinski, the Court found irsufficient evidence of their active participation in the "whitewash," but found that evidence of their presence, acquiescence, and failure to take steps to correct or prevent the conspiracy, was sufficient to go to the jury under 42 U.S.C. 1986.* Id.,at 629.

The defendants here attempt to paint themselves as agency officials, similar to administrative law judges, and thereby seek to clothe themselves with the absolute immunity afforded to administrative officials by the rule in Butz. They claim that these defendants, charged with investigating misconduct of theirfellow officers, are acting in a judicial capacity. (S. Def. Pet., p. 53). A comparison of the Butz opinion to the case at bar shows that this argument is specious. In Butz, the Court found that adjudication within a federal administrative agency shares enough of the characteristics of the judicial process to warrant immunity for the decision-makers. Butz, at 512-13. The factors relied upon by the Court include hearing officers' supposed insulation from political influence; the adversarial nature of the proceedings; the supposed impartiality of the decision-making process; and the officer's power to rule on evidence, issue subpoenas, and make findings of fact and conclusions of law. (Id.) Most importantly, the Court found that the Administrative Procedure Act assured independent judgment because it guarantees that the "hearing examiner is not responsible to or subject to the supervision or

---

*Similarly, the Court found sufficient evidence to hold Assistant State's Attorneys Meltreger, Jalovec, and Sorosky under 42 U.S.C. 1986, characterizing their actions as "the deliberate preparation of perjured testimony," but found that these actions, by prosecutors, were immune under Imbler. Hampton II, at 633. Defendants imply that because the police defendants participated in these acts, as well as other aspects of the sham investigation, they too should be immune. To so hold, however, would cloak police with the same immunity as prosecutors whenever part of their investigative duties coincide with those of the prosecutor. Such an interpretation would completely defeat the holding of this Court in Pierson v. Ray, 386 U.S. 547 (1967), and be a totally unwarranted extension of the doctrine of prosecutorial immunity. See also, Hilliard v. Williams, 516 F.2d 1344 (6th Cir. 1975), cert. denied, Hilliard v. Clark, 423 U.S. 1066(1976); Hilliard v. Williams, 540 F.2d 220(6th Cir. 1976).

directing of employees or agents engaged in the performance of investigative or prosecutive functions for the agency." Butz, at 514.

Here the evidence showed that the IID defendants were police officers who suppressed evidence and conducted a sham investigation in a way to suppress conflicting evidence. There was no hearing, nor even any chargesbrought as a result of the investigation. These officers were in no way acting in a judicial or prosecutorial role. Defendant Captain Mulchrone, who personally supervised what the defendants themselves admitted was a "whitewash," was the head of both the IID and the Police Intelligence Division; in the latter role he participated in planning the proposed November 24th G.I.U. raid on Hampton's apartment--the raid which was called off after defendant Johnson's phone call.*

---

*The IID was so notorious for its "rubber stamp" approval of all kinds of police violence in Chicago that, in 1973, after an extensive Chicago Tribune study on police violence and the IID was released, the Superintendent removed the investigation of brutality complaints from the police department and placed it under civilian control with civilian investigators. Their performance in this case was no doubt one of the main reasons for this change. As the Federal Grand Jury Report stated,

> The performance of this branch of the Chicago Police Department--the branch dedicated to impartial and objective investigations of police conduct--was so seriously deficient that it suggests purposeful malfeasance. The regular channels of the IID were bypassed. Instead of a complete investigation of any of the factual controversies raging in the press, the investigation consisted only of gathering all police reports, soliciting cooperation from counsel for persons accused of crimes (knowing that no defense counsel would permit pre-trial statements by an accused) and asking the officers involved a few simple conclusory questions in which they denied wrongdoing. No officer was given the opportunity to explain what happened in detail and all the subordinate officers were asked only to ratify their sergeant's account--which itself was based not only on prepared questions, but suggested answers composed by a police department lawyer and shown to the sergeant in advance.
>
> Nor did the IID investigate any potential violations of police department regulations by the Officers...
>
> Even the media accounts available to the IID clearly frame an issue as to whether the police department's own regulations were violated.
>
> Moreover, the publication of the results of this "investigation," in the view of the Grand Jury, was misleading to the general public by inferring that a legitimate investigation was held. The Grand Jury found a more detailed account of the raid in the Chicago Tribune than it did in the IID files.
>
> The Grand Jury recommends that immediate steps by taken to insulate the IID from any interference or pressure; that firm written procedures be established for the handling of investigations where officers are involved in shootings; that a directive prohibit the advance reading of questions and suggested answers to persons whose conduct is in question; and, that an alternative system of dealing with investigations of police conduct be explored. An organization charged with the responsibility of evaluating the conduct of police officers must have public credibility to succeed. The facts in this case show that the IID's performance does not deserve such confidence.

Federal Grand Jury Report, at 122,123.

(continued)

In this IID "proceeding ," there was no hearing, no testimony, no findings of fact, no record, and no appeal. Instead there were wholly contrived statements, and defendant Sadunas' false report, on the basis of which the defendants, three days later, with much fanfare, publicly exonerated the raiding defendants from any blame.*

The policy reasons for providing immunity to judges and prosecutors acting in their advocacy functions are wholly absent in the context of this IID "case." To apply Butz to afford these defendants absolute immunity would be a giant, totally unwarranted extension of the doctrine of judicial immunity and would overrule Pierson v. Ray. In point of fact, it would effectively abrogate a large portion of the Civil Rights Act. The petition for certiorari on this issue must therefore be denied.

E. THE CIRCUIT COURT'S DECISION DOES NOT CONFLICT WITH THE DECISION IN YASELLI V. GOFF OR THOSE OF OTHER CIRCUITS, BECAUSE THE DEFENDANTS' POST-RAID LIABILITY IS SUPPORTED BY MUCH EVIDENCE INDEPENDENT OF THEIR GRAND JURY TESTIMONY.

Defendants claim "the decision of the Court below conflicts with this Court's decision in Yaselli v. Goff and decisions of other circuits because the Court below allowed the use of prior testimony of a witness as substantive evidence of that witness's conspiring to violate or to deprive constitutional rights." (Defendants' Point IV)** They claim that because the raiders' Grand Jury testimony composed one element of proof of their involvement in the post-raid conspiracy, they should be immune from suit for all of their post-raid actions, under the rule set forth in Yaselli v. Goff, 12 F.2d 396 (2nd Cir. 1962) affirmed without opinion, 275 U.S. 503. In reality, the Circuit Court clearly set forth several additional bases, unrelated to their grand jury testimony, which both firmly placed these defendants in the post-raid conspiracy,

---

(continued)
Concerning the general effectiveness of internal police disciplinary boards, see f5.3, Standards relating to the Urban Police Function, ABA Project on Standards for Criminal Justice, 1973, pp. 158-59.

*Illinois law, at that time provided simply that the Superintendent could suspend police officers for up to 30 days by whatever method he saw fit. Only if the suspension was for more than 30 days, was the officer entitled to a hearing before the Police Board, with certain due process guarantees, if the officer himself sought the hearing. Ill. Rev. Stat. 1969, Ch. 24, §810-1-18.1.

**Defendants state the issue as "whether testimony of a witness in a prior proceeding may be used to create liability for the witness under 42 U.S.C. §1983, 1985(3) or 1986?"

and established their individual liability under 42 U.S.C. 1983:

- Several survivors were jailed on the basis of the officers' sworn complaints that they committed attempted murder and aggravated battery against the raiders. Hampton II, at 630.
- On the morning of December 4th, the raiders, Hanrahan, Jalovec and Mitchell met and from their conversations emerged an allegedly distorted if not false account of the raid which justified the officers' actions. Id., at 627.
- In the days that followed they continued to circulate reports to justify the survivors' continued detention. Id., at 628.
- They participated in a promotional campaign including the Chicago Tribune Exclusive and CBS T.V. "reenactment", giving their false versions of the raid, while knowing that it would occasion prejudicial pre-trial publicity to the plaintiffs. Id., at 616-17. 628.
- They participated in the IID "Whitewash" investigation, which was designed to suppress inconsistent evidence; Id., at 628, 629.
- They spoliated evidence at the scene on December 4th; Id., at 616.

It was on this evidence, as well as evidence that the plaintiffs' subsequent indictments were based in part on the raiders' testimony, that the Court found that the plaintiffs had made out a prima facie case that these defendants "instituted an unfounded prosecution, and supported its continuation," Id., at 620, (refering to §1983 individual liability claims), and further, that "a jury reasonably could infer that a conspiracy existed to conceal the facts of the raid and continue an unfounded prosecution against the plaintiffs," (referring to 42 U.S.C. 1985(2) and (3) claims) Id., at 628. Therefore, even if one assumes, as the defendants claim, that defendants' Grand Jury testimony cannot be used to establish their liability, the Court relied on much additional evidence which established their involvement in the post-raid conspiracy, established numerous overt acts in furtherance thereof, and additionally and alternatively established a prima facie case of non-conspiratorial liability under §1983.

Further, the principle of absolute immunity for a witness was no more than dictum in the 2nd Circuit's decision in Yaselli, since the only issue actually before the Court was that of prosecutorial immunity.

Approval of the Yaselli dictum in passing by the Court in Butz can hardly be said to have elevated it to the status of a holding by this Court. The defendants have cited several Circuit Court cases which have held that witnesses are immune from suit for their testimony; however, in each instance, the cases concerned trial testimony, where protection against prejudice and inflammatory statements by a witness, which lie in cross-examination and evidentiary rulings by the trial Judge, are obviously much greater than at a Grand Jury. See, e.g., Brewer v. Horowitz, 535 F.2d 830, at 837, (3rd Cir. 1976). At a grand jury proceeding, there are no such protections against malicious prosecution.

In the one reported case involving testimony was before a grand jury, rather than at trial, the Court found that the witness, a federal prosecutor, was not immune from suit. Briggs v. Goodwin, supra. In Briggs the Court also distinguished between immunity for civilian witnesses and those who are government or state officials, pointing out that the policy behind common law immunity--designed primarily for private citizens--was not present where the claim was constitutional and the witness a government agent. Briggs, supra, at 27-8; see also Burke v. Miller, 580 F.2d 108 (4th Cir. 1978) (Winter J. concurring at 111-112.) Similarly, the Sixth circuit has held that a police officer who suppressed evidence and gave misleading testimony at trial is liable under 42 U.S.C. 1983, and 1985; Hillard v. Williams, 516 F.2d 1344 (6th Cir. 1975) cert. denied as to police officer Clark, Hilliard v. Clark, 423 U.S. 1066 (1976), Hilliard v. Williams, 540 F.2d 220 (6th Cir. 1976). The most crucial distinction between the cases relied upon by the defendants and the instant case, is that the entire basis of asserted liability in the other cases was found in the defendants' witness testimony; and that is certainly not the situation here.

The defendants also claim that the Court below erred by allowing the grand jury testimony to be used as substantive evidence to prove the conspiracy. This is a further large step, even from the dictum in Yaselli, and one which is not justified by the rationale behind immunity, or existing case law. Harris v. Harvey, 605 F.2d, at 335. Again, however, even if thistestimony could not be considered, there is independent evidence to establish liability, as set forth above.

This issue is therefore not worthy of this Court's review, since there is no real conflict with Yaselli v. Goff or the decisions of other Circuit Courts of Appeals. The decision of the Court of Appeals is firmly based on the evidence in the record, the vast majority of which had no relationship to grand jury proceedings.

F. THE CIRCUIT COURT CORRECTLY FOUND THAT PLAINTIFFS HAD PROFFERED SUFFICIENT EVIDENCE OF THE DEFENDANTS' BAD FAITH TO REQUIRE A JURY DETERMINATION, AND DID NOT IMPROPERLY PLACE THE BURDEN OF PROVING GOOD FAITH ON THE DEFENDANTS.

The defendants claim that "the Court below is in conflict with other circuits in placing the burden of proving good faith on defendants." (State Defendants' Petition, Point VIII)* They argue that plaintiffs did not introduce evidence of the defendants' bad faith and that, given that premise, the Court of Appeals' decision, contrary to decisions in the First and Fifth Circuits established a rule that the defendant must prove his good faith. They cite Cruz v. Beto, 603 F.2d 1178 (5th Cir. 1979), and Kosta v. Hogo, 560 F.2d 37 (1st Cir. 1977). Defendants place much reliance on the fact that the plaintiffs did not call many of the defendants to the stand, and that "plaintiffs did not identify any of these defendants, nor testif(y) how any one of them caused any damage." (St. Pet. at 67) This argument demonstrates a deliberately misleading interpretation of both the Rules of Evidence and basic concepts of adequate proof. Prior admissions of defendants, by deposition, other testimony, and in documents, are admissible along with statements by co-conspirators under the Federal Rules; and plaintiffs convincingly proved a prima facie case against the non-testifying defendants by the use of this evidence. For example, admissions placed the non-shooting defendants in the pre-raid planning meetings, and in the apartment when some defendants beat and racially abused the plaintiffs while others "callously chose to watch", and while evidence was spoliated at the scene; admissions established the IID defendants and the non-shooters'

*Defendants say the issue is "whether a defendant in an action under 42 U.S.C. §1983, et seq., has the burden of showing good faith, or does Plaintiff have the burden of showing defendants' bad faith? Is the "good faith" of a defendant which was shown during Plaintiffs' case sufficient to direct a verdict in favor of the Defendant, or is the question of "good faith" always a jury question?"

roles in the IID "whitewash", false arrests, malicious prosecutions, and coverup of evidence. Prior admissions established that defendant Sadunas, the firearms examiner, falsely matched two shot shells fired from a police gun with that of Brenda Harris, in order to conform with the police story that Harris fired first; and this report was used by the co-conspirators in the IID investigation to get indictments before the Cook County Grand Jury, and to publicly support and justify the raiders' false version of the event. This evidence further showed that when Sadunas issued his false report, he had not tested the raiders' weapons, and that he made no effort to do so until after the FBI expert, Zimmers, discovered his mis-identification and called it to his attention some three months after the raid. Zimmers also testified that there were "no similarities whatsoever" between the shotshells in question and Harris' gun, and that, in 35 years of experience as a firearms examiner, he had never seen such a gross and obvious error by someone of Sadunas' expertise. (Tr. 20384) The Court below correctly held that the jury should determine, on this evidence, "whether his misidentification was the result of professional incompetence or conspiratorial conduct." Hampton II, supra, at 629*--in other words, whether he acted in good faith.

Likewise, the evidence presented by the plaintiffs against the defendants who did testify more than establishes a prima facie case of bad faith. The evidence against Hanrahan and Jalovec is summarized in Argument A, supra, and their testimony at trial did no more than put plaintiffs' evidence in issue. As to the "shooters," the Court found, as evidence of the defendants'

---

* There is, however, evidence--and reasonable inferences--pointing to Sadunas' participation in the post-raid conspiracy. Sadunas' initial ballistics test was incomplete; he compared spent shotsells from the apartment only with the weapons seized at the apartment and ignored the weapons which had been used by the raiders. His examination resulted in a crucial misidentification which would have remained uncorrected absent Zimmers' subsequent tests and conclusions. When he learned of Zimmers' findings, Sadunas retested the shells comparing them with all the weapons--including those of the raiders. After these tests, Sadunas readily admitted his mistake. Given this set of events, we think that the determination whether his misidentification was the result of professional incompetence or conspiratorial conduct should have been left for the jury.

Hampton II, supra, at 629.

lack of good faith, that

> ...it reasonably could be inferred that Mark Clark's gun fired during his struggle with Groth rather than when the police officers first broke through the door. Additionally, plaintiffs testified at trial that none of the survivors fired a gun during the raid. And Zimmers' expert testimony corroborated these assertions. Numerous other questions of fact are present in the record, including the issue of whether Fred Hampton was drugged at the time of the raid and shot deliberately after Johnson, Truelock, and Bell had left the bedroom.

Hampton II, supra, at 625.

In fact, the evidence of their bad faith was so overwhelming that Chief Judge Fairchild, concurring, suggested it was possible that the plaintiffs' evidence would have "compelled a verdict for the plaintiffs unless rebutted." Hampton II, supra, at 648

As this Court has confirmed, the issue of good faith is one for the jury in all but the most unusual circumstances. Adickes v. Kress, 380 U.S. at 176 (Black concurring); Imbler v. Pachtman, supra, at 419 (n. 13). See also Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1978). The Court of Appeals after thoroughly examining plaintiffs' evidence in light of the standards set forth by the Court in Wood v. Strickland, 420 U.S. 308 (1975) and Scheuer v. Rhodes, 416 U.S. 232 (1974)* as well as in Adickes and Imbler, found that the plaintiffs had met their burden of proof on the issue of good faith and should have survived the motion for directed verdict. The Court below neither expressly or implicitly placed the burden of proving good faith initially on the defendants,** and the defendants can point to no statement in the opinion by which it does. This unfounded claim is totally unworthy of consideration by this Court.

---

*See Hampton II, at 634-5. "Thus we hold that the question whether defendants reasonably believed their conduct did not violate a constitutional right, given the evidence presented at trial, should have been submitted to the jury" and "a determination of whether their (the defendants') actions satisfy the conditions for this defense (qualified immunity) must await the retrial." Hampton II, at 635 (emphasis added)

**The plaintiffs, however, do not wish to convey that they subscribed to the wisdom or correctness of placing this burden on the plaintiffs, as apparently held by the First and Fifth Circuits. We argue only that our case does not conflict with these cases on this issue. Further, even if it could be found that the Circuit Court somehow misapplied the burden to the defendants, there was sufficient evidence of bad faith presented so that the same result must be reached--as was the case in Cruz v. Beto.

G. THE CIRCUIT COURT CORRECTLY FOUND THAT THE PLAINTIFFS HAD TENDERED SUFFICIENT EVIDENCE OF THE STATE DEFENDANTS' ANIMUS, INDEPENDENT OF THE FBI'S COINTELPRO PROGRAM, TO NECESSITATE SUBMISSION TO THE JURY

The state defendants in Point VI claim that "the Court below failed to apply the requirement that to establish liability under 42 U.S.C. §1985(3), an invidiously discriminatory animus must be proved against each person sought to be held liable thereunder."* The defendants claim the Court's rule in Griffin v. Breckenridge, 403 U.S. 88 (1971), requires such proof,** and that because these defendants claim they did not know about COINTELPRO, and since plaintiffs' purported to prove animus by COINTELPRO alone, plaintiffs therefore did not meet this burden.

The Court of Appeals determined that the federal and state defendants shared a "racial or otherwise class based animus," as required by Griffin:

> Defendants also contend that plaintiffs have failed to state a claim under section 1985(3) because they have not proved that a racial or otherwise class-based, invidiously discriminatory animus was behind the conspirators' actions. Proof of a class-based animus underlying the conspiracy is, of course, a requirement of a section 1985(3) claim. Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). Griffin itself held that race was such a class-based animus, but did not establish what other types of class-based animus were sufficient to state a claim. The conspiracy alleged in this case, however, does not require an intensive anayisis into either the meaning of Griffin or Congress' intent in drafting section 1985(3) to determine whether the class-based animus requirement was satisfied. The statute was intended, perhaps more than anything else, to provide redress for victims of conspiracies impelled by a commingling of racial and political motives. And this is precisely the sort of conspiracy alleged by plaintiffs in this case.

Hampton II, at 623*** (Footnotes omitted.)

---

*The defendants say the issue is "whether a conspiracy may exist where there is no proof that Defendants know about the object of the conspiracy and where Plaintiffs admit that fact? Must invidiously discriminatory animus be proved against each alleged conspirator under 42 U.S.C. §1985(3)?

**In fact Griffin does not stand for the proposition for which the defendants claim it does, as it neither sets the terms for proving animus, nor does it require that animus be separately and affirmatively established for each co-conspirator; or even, for that matter, for each grouping of conspirators.

***Defendants argue that race alone could not possibly be the substance of the "animus" which must be shown under Sec. 1985(3), since five of the raiders were black themselves. (St. Pet, p. 63) Aside from the fact, plainly noted by the Court of Appeals, that the conspiracy alleged by plaintiffs was "impelled by a commingling of racial and political motives," (p. 623) it is simply a further exercise of racism to pretend that racial oppression does not result in some members of the subjugated group being turned against--and, like the legendary "black overseer," used against--their own people; and, in such

(Footnote continued on next page following.)

The Court then summarized the evidence upon which it rested its determination:

> A brief recital of some of the evidence presented by plaintiffs substantiates this conclusion. The BPP was a black organization with a distinct political ideology and a variety of politically oriented programs. FBI documents offered by plaintiffs demonstrate that certain FBI activities directed against the BPP transcended mere "law enforcement," and were designed to "neutralize" the BPP as a political voice on racial issues. Hanrahan testified that two of the principal goals of the unit his office assigned to investigate the BPP were to combat the anti-police propaganda the BPP had been disseminating in the black community and to mobilize support among blacks for police. And one of the purposes of the post-raid coverup was to prevent the development of widespread sympathy for the BPP cause which might have arisen out of a full disclosure of the facts surrounding the raid and the deaths of Clark and Hampton. Such purposes, if proven, bespeak of a class-based animus which is at the heart of section 1985(3)'s prohibitions. There is no doubt that the plaintiffs have satisfied this requirement for proving a section 1985(3) claim.

Hampton II, at 624

Additional evidence of this shared animus is found in actions and words of the raiding officers themselves--the extreme violence employed against these young, black members of the Black Panther Party during the raid, the racial and political epithets which accompanied the post-raid arrests and beatings by these defendants at the apartment, and the defendants' post-raid actions in continuing to harass and disrupt the plaintiffs as BPP members.*

The Court then further held that:

> "the plaintiffs presented considerable evidence including FBI documents and express statements by Hanrahan from which reasonable persons could conclude that these parties shared a 'class-based or otherwise discriminatory desire to undermine the BPP...and that a reasonable jury could find that the actions of these defendants demonstrate that they agreed at least tacitly to work together to eliminate the BPP."

Hampton II, at 624 (emphasis added)

***(Footnote continued from previous page.) "quislings" coming to conciously share the racial animus of their white masters against their own people. See generally, Frantz Fanon: The Wretched of the Earth; Black Skin, White Masks.

*The defendants claim that Askew v. Bloemker, 548 F.2d 673 (7th Cir. 1978) precludes consideration of such evidence. This is not true, i.e., Askew only forbids establishement of a class (in Askew it was those whose apartments were raided by the defendants) on the sole basis of the event complained of. Here the defendants' words and actions during the raid and after is further evidence in support of the pre-existing animus of the defendants, which was independently shown. It is sheer nonense to contend that such evidence cannot be considered on the issue of animus.

And, after stating that "individual motives underlying the common illegal desire to achieve the conspiratorial objective need not be identical," the Court expressly rejected defendants' claims concerning the secrecy of COINTELPRO. The Court held that plaintiffs presented enough evidence that the federal and state defendants had a common purpose--inflicting injury to the BPP/and these plaintiffs by means of a common plan, the raid--to establish both the shared animus, and the common object of the conspiracy. Hampton II, at 624

Therefore, as the Circuit Court clearly recognized, the plaintiffs do not rely on FBI documents to show animus on the part of the state defendants, but find it in Hanrahan's pre- and post-raid statements and actions, and the other defendants' words and actions both at the apartment on the morning of December 4th and subsequently. Defendants' argument that their alleged ignorance of COINTELPRO acts as a bar to proof that they shared the racial or class-based animus of the federal defendants, and that all evidence to the contrary must be ignored, is sheer nonsense; and certiorari cannot reasonably be granted on this issue.

H. THE CIRCUIT COURT CORRECTLY HELD THAT PLAINTIFFS' CONSPIRACY CLAIMS UNDER 42 U.S.C. 1983 SHOULD GO TO THE JURY; ITS HOLDING IS CONSISTENT WITH THIS COURT'S DECISION IN ADICKES V. KRESS, AND DOES NOT CONFLICT WITH CHAPMAN V. HOUSTON WELFARE RIGHTS

Defendants claim that "the decision below, by sustaining a cause of action for conspiracy to violate 42 U.S.C. §1983, has created substantive rights contrary to the law as announced by this Court." (Point VII)*

They argue that Chapman v. Houston Welfare Rights, 60 L. Ed. 2d 508 (1979) and Adickes v. Kress, 398 U.S. 144 (1970), preclude plaintiffs' 42 U.S.C. 1983 conspiracy claim against them because the plaintiffs have not made a prima facie showing that each defendant deprived them of a right secured by the Constitution. This claim is absurd. First, the plaintiffs, as the Circuit

*Defendants state the issue as whether there is a cause of action for conspiracy to violate 42 U.S.C. 1983 since Chapman v. Houston Welfare Rights, __U.S.__, 60 L.Ed 2d 508, 522 (1979) holds that no substantive rights were created by 42 U.S.C. 1983.

Court correctly held, made out a sufficient case of Constitutional deprivation against each co-conspirator under 42 U.S.C. 1983 to go to the jury:

> Plaintiffs have presented evidence which could suggest that the defendants both as part of a conspiracy and individually--violated, among others, their clearly established First,[33] Fourth,[34] and Fourteenth Amendment rights.[35]
>
> [33] The suppression of plaintiffs' political speech through harassment, intimidation, and subversion--part of plaintiffs' case against the defendants--would constitute violation of a clearly established right.
>
> [34] An illegal entry based on a falsified warrant is a violation of clearly established Fourth Amendment Protections.
>
> [35] Killing and wounding the inhabitants of an apartment without cause, placing the survivors in jail, and subjecting them to trial based on spurious charges is a patently obvious violation of an individual's right not to be deprived of life, liberty, or property without due process of law.

Hampton II, supra, at 635 (emphasis added).

This holding, as supported by the record, disposes of the defendants' claim, even assuming the validity of its premise. Such a construction, however, does violence to this Court's decision in Adickes, and in fact is an argument that Chapman overrules Adickes, which would effectively vitiate just about all such conspiracy claims. In point of fact, Chapman simply holds that mere allegations that 42 U.S.C. 1983 was violated, without claimed violations of some underlying, substantive Constitutional right, are insufficient because U.S.C. 1983 simply provides a remedy, rather than creating an independent, actionable, statutory right. The decision makes no mention of 1983 conspiracies, and has no application to circumstances where there are numerous Constitutional deprivations.

In Adickes the Court held that the plaintiff would be "entitled to relief under 42 U.S.C. 1983" if she could prove that "a Kress employee... and a policeman somehow reached an understanding to deny Ms Adickes service in the Kress store, or to cause her subsequent arrest because she was a white person in the company of Negroes." Adickes, supra, at 152. (Emphasis supplied.) The requirement then, is an understanding or agreement to deprive the plaintiff of her civil rights, which directly causes a Constitutional deprivation. This is a basic premise of the law of conspiracy and joint action, and satisfies the Adickes standard, that the plaintiff must prove the defendant deprived her/him of a right secured by the "Constitution and laws of the United States." Id. at 150. The defendant's contention that the plaintiff in a 1983 conspiracy must prove that each defendant individually violated a Constitutional right

is therefore completely refuted by the holding in Adickes, as well as elementary principles of conspiracy.*

Adickes, then, totally supports the Circuit Court's decision and in fact, it specifically relied on Adickes to support its holding that the plaintiffs made out sufficient 1983 conspiracy claims to go to the jury. Hampton II at 621. Chapman in no way undercuts the Court's holding because the plaintiffs here alleged and proved both individual and conspiratorial deprivations of underlying substantive constitutional rights, as well as a shared understanding and agreement which resulted in the onstitutional deprivations. As the Court below said:

> The defendants raise several questions about the legal sufficiency of plaintiffs' conspiracy claims which must be discussed. First, defendants contend that in order to have an adequate claim for relief under section 1983, a plaintiff must allege and prove both a conspiracy and an actual deprivation of rights; mere proof of a conspriacy is insufficient to establish a section 1983 claim. This statement of the law is correct, see Lesser v. Braniff Airways, Inc., 518 F2d538, 540 n.2(7th Cir. 1975), but we do not see how this affects the viability of plaintiffs' claims in the instant case. Plaintiffs' prima facie case offers a number of Constitutional deprivations to accompany their conspiracy allegations; clearly, the evidence would support a finding of injury which would constitute deprivation of Constitutional rights. Thus, this requirement of a section 1983 claim has been satisfied.
>
> Hampton, supra, at 622-3.**

*Additionally, the evidence that a policeman was in the cafeteria at the time the plaintiff was denied service, and subsequently arrested her, was found by this Court in Adickes to be sufficient proof of the conspiratorial understanding, and to require his involvement in the 42U.S.C.1983 conspiracy to be determined by a jury. Here the evidence of each defendant's shared understanding and involvement in both the raid and post-raid conspiracies to deprive the plaintiffs of their Constitutional rights was far more compelling than the evidence relied on in Adickes.

**The Court further held that liability for civil conspiracy requires proof of more than an agreement among conspirators; a plaintiff must show that an actual deprivation of her/his rights resulted from the conspiracy. See supra, p. 622. The raid and the injuries suffered by plaintiffs as a result of the raid be found to constitute this actual deprivation of rights. Thus plaintiffs have established a prima facie case sections 1983 and 1985(3) for civil liability: a conspiracy to violate their civil rights, and actual deprivation of those rights arising from the implementation of the conspiratorial plan. Hampton II, at 627.

The Court carefully followed the holding in Adickes which is in no way affected by the subsequent holding in Chapman. This claim by the defendants does not supply even a colorable basis for granting certiorari and the Petition on this issue must also be denied.*

*The Defendants' claim that the plaintiffs, by their 1983 conspiracy claim, are somehow trying to get around the requirement that animus be shown, in 42 U.S.C.1985. As the Court below recognized, the 1983 claim is supplemental to the 1985 claim, although premised on the same evidence. Plaintiffs are not attempting to "get around" the requirements of 1985; they have made out a strong case under that provision. Section 1983, however, permits them to recover for a conspiracy to deprive them of their constitutional rights, if proven, even if the jury determines that it was not done with either a "racial or class based animus."

I. THE COURT OF APPEALS CORRECTLY APPLIED THE BALANCING TEST OF ROVIARO v. U.S. IN RULING THAT DEFENDANT GROTH MUST DISCLOSE THE IDENTITY OF HIS ALLEGED INFORMANT; AND THE COURT'S DECISION IS ENTIRELY CONSISTENT WITH THIS COURT'S RULE IN FRANKS v. DELAWARE ON THIS ISSUE.

Defendants argue that " the court below wrongfully ordered disclosure of the identity of a confidential informant and failed to follow this court's decision in Franks v. Delaware."* They seek this Court's review of the 7th Circuit's holding that defendant Groth must reveal his alleged informant on the false grounds that the lower Court's derision failed to follow Franks v. Delaware, 438 U.S. 154 (1978), Roviaro v. U.S., 358 U.S. 53 (1957), and two other Circuit Court decisions. Defendants completely ignore the evidence, relied upon by the Circuit Court below, that defendant Groth had no informant, and obtained the warrant, which was the pretext to the raid, by perjury. Further, they make the outlandish claim that "there is no dispute that defendant O'Neal was a reliable informant."*

The Court below correctly followed this Court's decision in Roviaro, as adapted to the circumstances of a civil case, applying the rule that, "where the disclosure of an informer's identity . . . is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way," Id. at 637. The Court correctly considered the competing interests to be balanced: "the free flow of information against the individual's right to prepare his defense [or the pursuit of his cause of action]" Id.; and the factors to be examined under the balancing test: "the relevance of the informant's information to possible defenses [establishment of a cause of action], the possible significance of the information, and the seriousness of the litigation." Id. at 637, 637 nt. 41.***

* Defendants say the issue is "whether a reviewing court may, in a civil case, for discovery purposes, compel disclosure of the identity of a second confidential informant on a search warrant, after identity of the first, an FBI paid undercover Black Panther, has been disclosed, where the warrant is valid based on the information from the disclosed informant alone (also corroborated by the search). Whether the reviewing court may compel disclosure without a trial court hearing?"

** A complete recitation of the facts on this issue, from plaintiffs' Brief in the Court of Appeals, is found at Appendix C.

*** The Court relied on Westinghouse Electric Corp. v. City of Burlington, 351 F. 2d 762 (D.C. Cir. 1965), in applying the rule in a civil case: The language employed by the Court in Roviaro encompasses civil litigation as well as criminal litigation, and the competing interests underlying the privilege and its exceptions are essentially the same in both contexts. (continued)

The Court proceeded to examine the "particular circumstances" of this case, in light of the Roviaro standards, finding that, although the "trial judge resisted plaintiffs' effort to make a record," Hampton II at 637, that a "considerable amount of evidence was introduced" which supported the conclusion that defendant Groth did not have an informant:

> First, Groth had no record of payments to his informant since, according to Groth, the informant's information was provided for advancement in other areas. Groth never elaborated what these incentives were. Further, the similarity of the content and the timing of the information received by Jalovec and Groth is striking: Each said that on December 2 his informant told him about the weapons, inhabitants and visitors to the apartment, the apartment's layout, and the BPP meeting on December 3. And while , as the state defendants correctly indicate, this could mean simply that the reports provided by two different sources were corroborated, the fact that each report was similarly incorrect about the number of sawed-off shotguns in the apartment casts doubts on this explanation. Groth's destruction of all the information he received from his informant , including the floorplan he allegedly constructed based on his informant's description of the apartment, also undermines Groth's claim that he had an independent source. More importantly, Jalovec asked Mitchell after the raid if he cared whether it was disclosed that he was "the source" for the information leading to the raid. And both Piper and Mitchell sent memoranda to the FBI in Washington which said that O'Neal was the only source for the pre-raid information. (Id. at 637-8, footnote omitted; emphasis supplied.)

Further evidence included Defendant Hanrahan's admission that the FBI supplied the information which was "the basis for the raid." (Tr. 28063), making a total of four of the six key raid planners who had at various times made admissions which strongly supported the plaintiffs' contention that Groth did not have his own informant.

The Court spelled out the importance of Groth's alleged informant to the plaintiffs' case:

> A determination that Groth's informant did not exist would have significant ramifications for plaintiff's case. The warrant used to gain entry to the apartment would be supported only by the misrepresented, triple hearsay Groth received from Jalovec, and Groth's own perjured statement. Perhaps more importantly, such a conclusion would bolster plaintiffs' conspiracy claims. It would be powerful evidence of Groth's bad faith vis-a-vis plaintiffs. And it would highlight the importance of the federal defendants in the alleged conspiracy. If O'Neal was the only eyewitness informant able to provide the crucial pre-raid information about the apartment, there could be no question that he and his conduit to the state defendants, Mitchell, were indispensable to the entire operation. (Id. at 638, emphasis added.)

(continued) The Court also cited Socialist Workers Party v. Attorney General, 565 F.2d 19 (2d Cir. 1977). See also Wirtz v. Rosenthal, 388 F. 2d 290 (9th Cir. 1967); Cashen v. Spann, 311 A2d 192 (1973); 334 A2d (1975); 364 A.2d 21 (1976); 376 A.2d 186 (1977).

The Court found, furthermore, that

> Even if Groth did have an informant, disclosure of his identity would be important to a resolution of the case since that informant might be a critical figure in the conspiracy alleged by plaintiffs. If O'Neal, who was being paid for his work by the federal defendants was also the informant Groth relied on in his affadavit, plaintiffs would have additional evidence of the federal involvement in the raid itself. Further, the person described by Groth as his informant--according to Groth a member of the BPP--could be a co-conspirator. Groth said that his informant asked when he was going to "move on the crib" and provided information about the weapons when told that the presence of weapons in the apartment would precipitate a raid. Also, as a member of the BPP, Groth's informant may have been in the apartment or at least with Hampton the night before the raid--an important fact given the testimonial and scientific evidence introduced by plaintiffs suggesting that Hampton had been drugged prior to the raid. (Id., at 638.)*

The Court, while "mindful of the public interest in 'protecting the free flow of information,'" also considered

> the need to maintain the integrity of and confidence in the criminal justice system. The assertion of informer's privilege by a law enforcement official defending against a civil suit for damages based on his own alleged official misconduct should be scrutinized closely. (Id., at 638.)

Restricting its holding to the unique and compelling facts of this highly significant case, the Court held that disclosure was required:

> This case, in which plaintiffs have alleged gross misconduct by federal and state law enforcement officials and have presented serious evidence to support these claims, is of paramount significance. There is a serious factual controversy focusing on the existence or identity of Groth's informant, and a resolution of this controversy is essential to a just adjudication of plaintiffs' claims. Thus we conclude that the public's interest in encouraging the flow of information to law enforcement officials cannot prevail in this case, and that Groth must disclose the identity of his informant. In order to minimize both the risks to this particular informant and any adverse effects on law enforcement generally, we suggest that the appropriate parties move at the retrial for a protective order to set the terms of this disclosure. (Id. at 638-9. Emphasis supplied.)

---

*Not surprisingly, the defendants in no way address these facts in their Petition. Instead they rely on a statement in the dissent that the plaintiffs have allegedly said that they seek the identity of Groth's purported informant in order to "try and find" evidence of illegality. In fact the plaintiffs never said this, and the statement by Judge Pell reflects his failure to check the claims in these defendants' briefs. Judge Pell simply repeated this claim of the defendants, which was made at page 183 of their brief. In this claim they cite to page 155 of the plaintiffs' appellate brief. Examination of this page and the rest of the brief shows that no such statement or anything even remotely similar, was made by the plaintiffs.

In their spurious, if somewhat desperate claim that the Court below was wrong in ordering disclosure of the identity of Groth's alleged informant, defendants ignore the factual record and the full basis for the Court's decision, and instead attempt to focus solely on the warrant itself.* They claim the lower Court's decision "ignored" this Court's decision in Franks v. Delaware, which established standards for determining when a Court should "go behind" a search warrant in order to determine its veracity. The decision there in no way alters or affects this Court's rule in Roviaro. Even if it did, and its standards were somehow grafted onto the Roviaro standards, the soundness of the Court's decision in the case at bar would be enhanced, not undermined. The same rationale, which compelled the Court to permit criminal defendants to challenge the facial validity of a warrant, is singularly and powerfully present here:

> ...probable cause, supported by an oath or affirmation, would be reduced to a nullity if a police officer was able to deliberately falsify allegations to demonstrate probable cause, and having misled the Magistrate, then was able to remain confident that the ploy was worthwhile. (Id. at 168)**

In attempting to make a colorable claim under Franks, the defendants first make the patently false assertion that there is "no dispute as to defendant O'Neal's reliability." They go on to reason that, if both O'Neal and his information are reliable, the warrant could stand without Groth's perjurious claims regarding his alleged informant. Given this premise, they then claim that, since Franks would prevent a piercing of the warrant, it also prevents revelation of the informant.

---

*The application for search warrant, which Groth submitted under oath, reads:

> A reliable informant, who has furnished reliable information to affiant on several past occasions which has led to the confiscation of 2 sawed-off shotguns in two separate raids, and has provided information that has led to several convictions, informed the affiant DANIEL GROTH that on December 1, 1969, he had occasion to enter the above described premises at 2337 W. Monroe, 1st floor apartment. During this visit, he observed numerous weapons, including three sawed-off shotguns, whose barrels appeared to be approximately 12 inches in length. Along with these weapons he observed numerous rounds of ammunition. When he left the premises the above described sawed-off shotguns were still there. Independently of this above information, DANIEL GROTH was informed by ASA Richard S. Jalovec that on December 2, 1969, Jalovec had a conversation with a reliable informant who also stated that sawed-off shotguns and other weapons were being stored in the first floor apartment at 2337 W. Monroe, Chicago, Ill. This informant, according to Jalovec, has provided information in the past which has led to the arrest and indictment of numerous individuals. (St. Def. Ex. 119.)

** The Seventh Circuit has strongly reaffirmed the importance of this deterrence of police falsification and misconduct: "intentional false

(continued)

In the first place, on the evidence, the contention that O'Neal was a reliable informant is laughable. At the time of the raid he was classified as a "probationary informant" by the FBI, and his information had allegedly led to "several arrests," but no convictions [illegible]lly important, as the Court notes elsewhere, was evidence showing that O'Neal was a provocateur and COINTELPRO agent, whose main job was to "disrupt and neutralize" the Panthers by, inter alia, spreading false stories and lies about its members. In fact, the record showed that prior to December 4th he had repeatedly reported false and exaggerated stories to Defendant Mitchell, in order to receive larger payments since his stipends were based on the "value of his information."

Secondly, the defendants claim the information supplied by O'Neal was reliable, whereas, in fact, as the Court correctly notes, it was "misrepresented triple hearsay."** Hampton II, at 638. Both O'Neal's own deposition testimony and FBI documents introduced at trial showed that O'Neal had not supplied Mitchell with any information concerning illegal weapons at Hampton's apartment, and that the information that he had supplied concerning weapons was stale by several weeks. (Tr. 22240) (PL 22, 83)

The evidence adduced at trial concerning the FBI portion of the warrant therefore more than satisfies the Franks test, even if the perjury concerning Groth's own alleged informant is ignored. Further, the defendants' own testimony at trial makes a lie of their argument, since defendant Jalovec, the assistant state's attorney who drafted the affidavit with Groth, testified that on December 3rd, he knew the O'Neal/Mitchell information was of insufficient legal reliability by itself to support probable cause ; (Tr. 24534-40, 25278) and Groth concurred in this opinion.

(continued) "swearing (of a warrant)...is such an egregious threat to Fourth Amendment rights that it deserves the strongest deterrent possible." U.S. v. Jose L. Fernandez-Guzman, 577 F.2d 1093 (7th Cir. 1978).

* In Illinois during 1969 such allegations of reliability in the search warrant affidavit were not considered sufficient indicia of reliability under the first prong of the test prescribed in Aguilar v. Texas, 378 U.S. 108 (1963) and Spinelli v. U.S. 394 U.S. 410 (1965).

** In the FBI portion of the warrant, defendant Groth swore that he got information from Jalovec who got it from a "reliable informant." In fact, as these defendants admitted at trial, this "informant" was defendant Mitchell who, contrary to the assertions in the warrant, had never been to the apartment, but who was rather relying on information supposedly supplied by the totally unreliable O'Neal.

Defendants assert that hearsay and multiple hearsay may be a permissible basis for a warrant. (St. Pet. p. 54) This may be true in a case where the reliability of the original source of information is proven; it can have no application where the basis is "misrepresented triple hearsay," from an informant the affiant knows to be unreliable, and where the information itself is rife with misrepresentations and contradictions. The particulars here thus outstrip the multiple hearsay condemned by this Court in Aguilar v. Texas, 378 U.S. 108 (1963).* So even if the Franks test is applied, and the apparent perjury concerning Groth's own alleged informant is ignored, the O'Neal/Mitchell portion of the warrant reveals additional "material misrepresentations" which are false, and is woefully insufficient as an independent basis for a finding of probable cause.**

Further, even if we accept the defendants' premises, i.e., that the O'Neal/Mitchell portion independently supplies probable cause, and that it contains no knowingly false material assertions, this still affects only the issue of probable cause and the plaintiffs' Fourth Amendment claims. As stated above, there are other important reasons for revelation under Roviaro, including its relevance to strengthening plaintiffs' claims of conspiracy and bad faith, especially if it is shown from Groth's own mouth that he had no informant.

The Confederation of Police, which has submitted a brief as amicus curiae, relies on some statements printed in the Black Panther Party newspaper eleven years ago to claim that the BPP presents a public danger to society, and that, under Roviaro, this requires that Sgt. Groth's purported informant not

---

* The case here can be sharply contrasted with the factual situation in U.S. v. Wilson, 479 F.2d 936 (7th Cir., 1973), cited by the defendants, for there the original "informant" was a computer, the data was given the credibility of business records by the Court, and the conduit was an undeniably disinterested private citizen. In this case, the source was quite unreliable, as demonstrated above, and the information was transmitted by two co-conspirators. In Wilson, the information led to the search of an automobile; here it was made the basis for a warrant used to effect a police raid in the dead of night, in which concentrated automatic weapons fire was directed at a place where raiders had been told an outspoken political opponent of the government would be lying asleep.

** The defendants also say that "the warrant has never been held invalid." It has never been held valid either, since defendant Hanrahan dismissed the charges against the survivors before their motions to suppress--or their motion for revelation of Groth's alleged informant--were heard in the criminal proceedings.

be revealed. While plaintiffs submitted much evidence of the positive programs and political activities of the BPP, it serves no purpose to go into them here.* Amicus lives in the past; whatever the "danger" may have been eleven years ago, it no longer threatens law enforcement, or "national security." The BPP has long since disbanded in Chicago, and has been largely involved in electoral politics in California, including the successful campaign of Oakland's Mayor Wilson. Former members of the Illinois Chapter include a former assistant state's attorney, a city employee, a congressional aide, a law school dean and law students, an aldermanic candidate, secretaries, health workers and a minister.

It is therefore ludicrous for Amicus to claim that either these plaintiffs or the remnants of the Black Panther Party present a "public danger." It is these defendants,who killed and seriously injured plaintiffs ten years ago and are still on the streets of Chicago armed with "color of law," who present a current "public danger," not the mothers of Fred Hampton and Mark Clark or those survivors who permanently carry the scars from machine gun bullets which tore them apart on the morning of December 4th. The Court of Appeals' decision does not jeopardize relationships between the police and their informants. It is restricted to the unique and compelling facts of this case, where, as the Court noted, the plaintiffs have presented "serious evidence" of "gross" police misconduct. Amicus would do well to heed the teachings of the Court below, instead of joining the defendants' unremitting ten-year effort to cover up and avoid the consequences of their own unconstitutional conduct.

Defendants claim alternatively that the Court below should have remanded for an evidentiary hearing on disclosure, although they put forward no reason which necessitates such a hearing. The Court dealt with this alternative:

> The trial judge never attempted to apply the Roviaro balancing test or to determine whether disclosure was essential to a fair determination of plaintiffs' cause of action.

*See Statement of Case, ante at pp. 5-8.

> The judge, in fact, resisted plaintiffs' efforts to develop a record on these issues. Ordinarily, we would remand the disclosure issue to the trial court for adjudication under the appropriate legal standards. In this case, however, enough evidence relevant to the validity of Groth's assertion of informer's privilege has been amassed throughout the trial to make such a remand unnecessary. Hampton, at 637.*

A hearing at this point would be quite superfluous; there has been a more than sufficient factual showing under Roviaro,and the Court has provided for an appropriate protective order. Additionally, the Court was well within its discretion to follow the course it did, and such an exercise of discretion hardly warrants review by this Court.

The Circuit Court, therefore, carefully followed the standards set forth by the Court in Roviaro , and, to the extent that Franks applies, the decision is likewise totally consistent. The defendants' claim on this issue is therefore entirely without merit, and must be denied.

---

* The defendants also claim that the trial Court did apply Roviaro, citing pretrial arguments. (St. Pet. p. 56.) Roviaro was briefed and argued before the District Court, but it does not follow that simply because the case was cited to the Court that he followed its holding. As the majority points out, he did not. They further argue that the Circuit Court denied the plaintiffs' mandamus on the informant issue in early 1975, but they fail to note that no record had been yet developed in support of the claim that this informant did not exist, and that the standard for review was more rigorous.

J. THE PROCEDURES EMPLOYED BY THE COURT OF APPEALS IN DISPOSING OF THE STATE DEFENDANTS' APPLICATION FOR REHEARING EN BANC WERE FAIR, IN ACCORD WITH STATUTE, AND WITHIN ITS DISCRETION; AND THAT COURT'S ACTION PRESENTS NO ISSUE REQUIRING THIS COURT'S ATTENTION.

The state defendants argue that "the en banc procedure of the Court below conflicts with the norms set by this Court and the intention of Congress."* They urge that Circuit Judges Bauer and Wood, despite the fact that both had recused themselves from participation in the case, should still have taken part in the vote on whether it should have been reheard en banc; or, in the alternative, that the Court's bench should have been replenished for this purpose by judges from elsewhere. (St. Pet. p. 69-72)

This claim is groundless. Despite the two recusals, a statutory quorum of the Court voted on, and rejected, the defendants' petition for rehearing, and this is all that is required. Sections 46(c) and (d) of the Judicial Code state:

> (c) Cases and controversies shall be heard and determined by a court or panel of not more than three judges, unless a hearing or rehearing before the court en banc is ordered by a majority of the circuit judges of the circuit who are in regular active service. A court en banc shall consist of all the circuit judges who are in regular active service.
>
> (d) A majority of the number of judges authorized to constitute a court or division thereof, as provided in paragraph (c), shall constitute a quorum. --28 U.S.C 46, as amended Oct. 20, 1978, Pub.L. 95-486, Sec. 5(a), (b), 92 Stat. 1633.

The statute clearly defines a quorum; five judges are and were required in the Seventh Circuit. In this case, six qualified active judges voted on the petition. This Court has held that a senior judge of the same circuit, who was active at the time of an orginal decision, was not eligible to vote on whether to rehear a case en banc because his participation would "frustrate

*The state defendants say the issue is, "(o)n a vote to rehear en banc, whether a judge may recuse; and if so, must he be replaced and the litigants afforded both notice in advance of the vote, of such en banc recusal, and of the replacement and recusal procedure established by the circuit? On request for en banc rehearing, whether a litigant is entitled to consideration of his petition by a full circuit of active sitting judges?" (Point IX) To the extent, whatever it might be, that the defendants were entitled to prior notice concerning the recusals, they had it in Judge Pell's dissent, where he wrote that Judge Bauer and Judge Wood had taken themselves off the case. Hampton II at 661, fn.3. As to the procedures for rehearing, replacement and recusal, they are more than adequately set forth in many prior decisions of of the Court. See citations below, page 72 , fn. *; page 73 , fn.*

a basic purpose of the legislation not to confine the power of en banc decision to the permanent active membership of a Court of Appeals;" and because the statute did not expressly provide for it. U.S. v. American Foreign Steamship Corp., 363 U.S. 685, 689 (1960).*

The defendants' argument that Judges Bauer and Wood were required to vote on the question of whether to grant rehearing or not, despite their recusal, sounds ridiculous. How could a judge, who originally determined that he should disqualify himself,** subsequently decide that he could sit? Since the Seventh Circuit has often both voted on rehearing en banc, and

*Since this decision, Congress twice amended the statute, first in 1963 to specifically allow senior judges who sat on the panel to sit in the rehearing, but not vote; and again in 1978, to delete this allowance. See Moody v. Albemarle Paper Co., 417 U.S. 622 (1974). At no time has Congress made any provision to authorize judges to sit en banc in other circuits. The Seventh Circuit has consistently followed this principle. On the five occasions during the past three years where rehearing en banc was granted and the original panel included a judge from another circuit or the District Court, the judge sitting by designation was not permitted to vote on the rehearing petition, or to participate in the en banc rehearing. See U.S. v. Chapman, 575 F.2d 147 (7th Cir. 1978) and 7th Cir. order of 6/23/77 granting rehearing; Jordan v. Trainor, 563 F.2d 873 (7th Cir. 1977), #75-1908 and 7th Cir. order of 4/25/77 granting rehearing; First Wisconsin Mortgage v. First Wisconsin Corp., 584 F.2d 201 (7th Cir. 1978) and 7th Cir. order of 10/6/78 granting rehearing; Novo Terapeutisk v. Baxter, #78-1180, 7th Cir. order of 4/15/79 granting rehearing (pending decision); U.S. v. Johnson, 590 F.2d 250 (7th Cir. 1979) and order of 3/23/79 granting rehearing (pending decision). But perhaps the most compelling statement of the Seventh Circuit's observance of this principle is found in the Otto Kerner case; where all of the active judges recused themselves from consideration of the defendant's en banc suggestions. The petitions were therefore never acted upon, and effectively denied without order. U.S. v. Isaacs, 493 F.2d at 1124 (7th Cir. 1974) and order of 3/6/74; see also, Re Imperial "400", 481 F.2d 41 at 57 (3d Cir. 1973), cert. denied, 414 US. 880 (entire Court disqualified themselves, rehearing en banc denied); North Carolina Utilities v. F.C.C., 552 F.2d 1036 at 1045 (4th Cir. 1977) (no rehearing en banc because all but one judge disqualified himself). See also, U.S. v. Barnett, 346 F.2d 99 at 101 (5th Cir. 1965); I.B.M. v. U.S., 480 F.2d 293, cert. den., 416 U.S. 980 (2d Cir. 1972) (five voted, six sat).

**It appears that Judge Bauer's tenure as U.S. Attorney (1970-71), at a time when the F.B.I. was still concealing the truth about its role in this case, and his involvement in prosecuting Black Panthers during 1969, suggests his disqualification for the appearance of justice. Similarly, Judge Wood's appointments as Associate Deputy Attorney General from 1969-1972, and Assistant Attorney General, Civil Division, 1972-73, as well as his subsequent candidacy for Directorship of the FBI, would support his decision to recuse himself, in deference to the appearance of possible conflict.

sat en banc with a quorum less than the full court,* it would seem both unnecessary** and harmful to the appearance of justice for judges to originally recuse themselves, requalify themselves for a vote on rehearing, only to disqualify themselves again if rehearing is granted.

Finally, the defendants protest that "three judges determine the law of this circuit composed of nine positions" *** in this case. But all the non-disqualified judges of the Circuit reviewed the decision, and passed upon the petition to rehear, in fact six of the eight active judges considered their petitions.**** It is an affront to each qualified judge of the Seventh Circuit, and especially to the majority, to imply that they did not fairly consider the opinion, the briefs, and the petitions, and vote as

*Of the 11 rehearing en banc petitions granted in the past three years by the Seventh Circuit, the vote was taken, and the Court sat en banc, with a quorum of six or seven judges on at least three occasions. See U.S. v. Robinson,585 F.2d 274 (7th Cir., 1978) and 7th Cir. order of 3/20/78 (seven and six respectively); First Lincolnwood, 560 F.2d 258(7th Cir. 1978) and order of 4/10/78 (seven and seven respectively); Lono v. Fenton, 581 F.2d 645 (7th Cir. 1978) and order of 4/10/78 (seven and seven); see also: I.B.M. v. U.S., 480 F.2d 293, cert denied, 416 U.S. 980 (2d Cir. 1972) (five of eight voted, six sat); U.S. v. Barnett, supra (seven of eight sat); Zahn v. International Paper , 469 F.2d 1033 (2d Cir. 1972) (seven of nine voted); Baltimore and Ohio R.R. v. Shenker, 303 F.2d 596 (3d Cir. 1961), aff'd. 374 U.S. 1 (1963) (six of eight judges voted).

**In Zahn v. International Paper, 469 F.2d 1033 (2d Cir. 1972), four of the seven voting judges voted to rehear the case, but since the full court consisted of nine judges, the petition for rehearing was denied. In Baltimore and Ohio R.R. v. Shenker, 303 F.2d 596 (3d Cir. 1961), aff'd, 374 U.S. 1, (1963), two of eight active judges recused themselves from the vote, and the petition for rehearing was denied, although four of the remaining six judges voted to rehear.

***Until October of 1978, the Seventh Circuit had eight active judges, pursuant to 28 U.S.C. 46. On October 20,1978, Congress amended the statute to provide for nine active judges in the Court. Following normal procedures Judge Cudahy was ultimately nominated, and on October 16,1979, after the rehearing petitions in this case were filed and denied, Judge Cudahy became the ninth active Judge on the Circuit.

****The state defendants incorrectly imply that it is highly unusual for three judges to speak for the entire court and that necessitates en banc rehearing. In fact, in the majority of cases, two Circuit Judges determine the law of the Circuit. In the past two and one-half years, over 10 per cent of the over 800 opinions issued by the Seventh Circuit have had a dissent. Further, 60 per cent of the decisions are rendered with at least one"visiting" judge. Therefore, in 60 to 70 per cent of the decisions of the court only two Seventh Circuit Judges have spoken for the Court.

the law and facts dictated.

This Court has stated that:

> En banc courts are the exception not the rule. They are convened only when extraordinary circumstances exist that call for the authoritative consideration and decision by those charged with the administration and development of the law in the circuit.
>
> U.S. v. American Foreign Steamship Comp., 363 U.S. 685,689 (1960)

In the case at bar, the Seventh Circuit followed its regular procedure in passing on the rehearing petition filed by the state defendants. These procedures did not conflict with any norm set by this Court nor with the intention of Congress. On the contrary, the procedure complied with the explicit language of 28 U.S.C. 46(c).

These defendants are not entitled to preferential treatment, either by the Seventh Circuit or this Court. It would be most improvident to grant certiorari to review the procedures set by a Court of Appeals regarding petitions for rehearing. In the absence of extraordinary circumstances, such procedures are left to the sound discretion of the individual Circuits. The defendants' petition for certiorari on this issue should therefore be denied.

K. THE FEDERAL DEFENDANTS, IN SEEKING REVIEW OF THE REVERSAL OF THE DIRECTED VERDICTS ON THE GROUNDS THAT THE COURT OF APPEALS' DECISION CONFLICTS WITH THE RULE OF BUTZ vs. ECONOMOU, PRESENT NO CLAIM OR ISSUE WORTHY OF CONSIDERATION BY THIS COURT.

The federal defendants argue that this Court should grant certiorari in order to consider whether the Court of Appeals misapplied the standard for qualified immunity set forth by this Court in Butz v. Economou.* Specifically, they rely upon the District Court's purported determination, supposedly made after "painstakingly reviewing the evidence," that "the federal defendants' denials that they knew of or participated in any plan to violate plaintiffs' Constitutional rights...were uncontradicted by any testimony whatever."**(Fed. Pet. 29,30) They claim that if their testimony were reduced to affidavits, they would be entitled to summary judgment under the rule of Butz.

In fact, it is the defendants,not the Court of Appeals, who misapply the rule of Butz; compounding the offense by borrowing from the District Court's outlandish "summary" and otherwise substantially misrepresenting the evidence adduced at trial.

The Court of Appeals correctly held that the principal issue on appeal was whether the trial judge erred in directing verdicts for the defendants. After "comparison of the extensive record...and the trial judge's Summary," the Court held that "there can be no doubt that the District judge erred by supporting his grant of the directed verdicts with evidence which was considered in the light most favorable to the defendants." Hampton II at 608. Further, as the Court of Appeals recognized, and as the record graphically reflects, the District Judge was extremely sympathetic to the federal defendants and their claims and resolutely determined to defeat the claims of the plaintiffs, regardless of the strength of the evidence. As the Circuit Court recognized, he "repeatedly exonerated" the federal defendants,

*The federal defendants say the issue is"whether the court of appeals' reversal of directed verdicts in favor of petitioners is inconsistent with the standard set forth in Butz v. Economou,438 U.S.478(1978), for terminating constitutional tort actions in which federal officers' sworn denials that they engaged in non-immunized conduct are not squarely contradicted by other evidence in the record."

**They also cite the District Court's statement that the defendants' denials were not contradicted by any other evidence offered by the plaintiffs; and that their actions were taken pursuant to "lawful FBI regulations and directives." (Fed.Pet. pp. 8-9)

despite their "willful disobedience of Court orders, obstruction of the judicial process, and other dilatory tactics;" and his restrictions on discovery and questionable evidentiary rulings "hampered the plaintiffs' ability to marshall evidence" and "thereby denied the plaintiffs the fair trial to which they were entitled." Id. at 608, ft.6;641.

The record also shows that in ex parte communications before and during the trial, the District Judge expressed belief that plaintiffs' allegations and proof against the FBI defendants were "impossible." Additionally, he is now subject to possible disciplinary proceedings by the Seventh Circuit for three ex parte letters which he wrote to federal counsel setting forth his views on the plaintiffs' sanctions motions against the federal defendants which were then pending before him, letters in which he actively intervened on behalf of the federal defendants and their attorneys, and absolved them of all blame for suppression of evidence. (Appendix H)

It is in this context of judicial error, bias and misconduct that the "findings" of the District Court, and thus the arguments of the federal defendants, must be viewed. In essense, these defendants argue that there is no evidence--only "speculation and conjecture"--which contradicts their bald denials of the ultimate facts, that they conspired or acted in concert with the state defendants in planning a raid with the intent and motive to illegally deprive the plaintiffs of their Constitutional rights. As the Circuit Court painstakingly demonstrated, nothing could be further from the truth.

In the main, the plaintiffs' proof against the federal defendants consists of FBI documents, which contain the "most damning evidence" of their liability. Hampton II at 608-9. This evidence was supplemented by deposition and trial testimony from the defendants and other FBI agents, which established the course of their conduct before the raid and helped to further show their state of mind, illegal motive and evil intent. Additional post-raid evidence strongly reaffirmed the nature of this conduct, revealing their secret ratification of the grossly unconstitutional results of the raid itself, and establishing a compelling case of cover-up and concealment of evidence by these defendants, which continued through the trial.

The evidence showed that the federal defendants supervised and implemented COINTELPRO against the Black Panther Party in Chicago during 1968-69. The primary purpose of this program was not to investigate crimes or gather intelligence about criminal activities,* but to disrupt, neutralize, cripple and in fact, destroy the Black Panther Party and what it stood for, and to prevent the rise of dynamic Black leadership from within its ranks. (Id. at 609. PL 1,2,6,105-7. Senate Select Committee, Final Report, Book 3,p.187.)/ [Appendix D]

William O'Neal was an FBI informant who joined the Chicago BPP within weeks of its inception in Chicago. He answered directly to Mitchell, and, at Mitchell's express direction, implemented COINTELPRO by encouraging the Panthers to "initiate and participate in various criminal activities, to obtain more weapons, and to increase their use of violence." Hampton II at 609. These actions were expressly lauded by his supervisors.(Id., Pl 19) These defendants also attempted to entice Chicago "street gang" leader Jeff Fort to take violent "retaliatory action" against Hampton and other Panther leadership under the COINTELPRO program. (Hampton II at 609,Pl. #11-13) Evidence presented at trial also showed that FBI cooperation with local police under the Counterintelligence Program was done not for legitimate law enforcement purposes, but rather to unconstitutionally disrupt the BPP and other political organizations. (Hampton II at 610, Pl. #16-18, 25,301)

During 1969, the Chicago police attacked the BPP Office on several occasions. Unlike the FBI raid of June 4,1969, which was accomplished with no shooting, these raids occasioned armed confrontations in which several BPP members were injured and arrested. The FBI defendants kept careful watch on these events. In mid-November, 1969, there was another shootout on the Southside of Chicago during which two police officers and one former Panther were killed; Hampton and the Party eulogized their former member. Hampton II at 610. That very night, Mitchell met with O'Neal, and showed

*Defendant Piper conceded at trial that during their entire "investigation" of the BPP, the FBI in Chicago did not detect them violating any federal laws, nor did they initiate any Federal prosecutions against them.

him gruesome pictures of the dead police officers. Within days, O'Neal returned to Mitchell with detailed information concerning Hampton's apartment. Together they drew a floor plan of the apartment, complete with a designation of the bed where Hampton slept. (Pl. #21,* Hampton II at 610) At this same meeting, O'Neal allegedly supplied Mitchell with information concerning weapons supposedly being kept at Hampton's apartment.** Although Mitchell claimed that word of a federally illegal sawed-off shotgun and a stolen police shotgun was included in this information, he made no mention of those weapons in a November 21st memo which he sent both to the Alcohol, Firearms and Tax Division (ATFD) and to Bureau Headquarters. Rather, he wrote that all of the weapons were "legally purchased." (P. #22) The federal defendants conceded that the ATFD would be the agency to notify and to carry out a raid if there were federally illegal guns present, yet ATFD was never notified. Hampton II at 611.

Instead, after conferring with defendants Johnson and Piper, Mitchell met with officers from the Gang Intelligence Unit of the Chicago Police Department (GIU) and supplied them with the floorplan, the weapons information, and information concerning when Hampton would be at the apartment. (Tr. 6844, 6888-9, Pl. 21) Hampton II at 611. By his own admission, he discussed a raid with these officers, and the GIU planned a raid for November 24,1969. This raid was later called off after a telephone call from defendant Johnson to the Commander of the Intelligence Division. (Tr. 5026,32) Hampton II at 611.

Mitchell then re-contacted defendant Richard Jalovec, who was in charge of Hanrahan's Special Prosecutions Unit, and during the next week, they had 5-7 conversations about Hampton's apartment. Hampton II at 611 ft. (12) These communications were unusual since Mitchell had communicated with Jalovec on only one other occasion since the past April,

**When questioned at his first deposition in January, 1974 , O'Neal denied that he had supplied Mitchell with any new information about at the apartment in November or December of 1969 and said further that Mitchell was not particularly interested in BPP weapons, despite knowing there had been several kept at the apartment. At trial, after it had become obvious that the "new weapons information" was crucial to Mitchell's defense, O'Neal changed his story.(Tr. 22240) Conversely, Mitchell told Piper that he had "great interest" in the apartment itself. (Tr. 9347)

*See Appendix G.

when he had informed Jalovec that O'Neal, who had been arrested with several other Panthers for conspiracy to kidnap, was his informant. On December 2, Mitchell met face to face with defendants Groth and Jalovec, gave them the floorplan, and discussed other information, including times when people would be present and absent from the apartment the following day. (Pl 21, 412, Tr. 7002) Hampton II at 611. Piper was aware of and approved these communications. All the federal defendants admitted that the only conceivable use of a floorplan was to aid in staging a raid.*(Pl 413) They also testified that, during this time, they had discussed the possibility of making a raid themselves. (Tr. 7017) On December 3, 1969, Johnson and Piper sent a memo to FBI headquarters advertising the impending raid as a Counterintelligence effort designed to disrupt the Panthers.** (Pl #25), Hampton II at 612,639.

O'Neal visited the apartment the evening of December 3rd, possibly staying as late as midnight, past the time when Hampton and others had a meal. Sometime on the 3rd he called Mitchell, evidently providing last-minute information on Hampton's probable movements that evening. (PL58; Tr. 15642-4) Before morning, unable to awaken despite the gunfire, and evidently heavily drugged, Hampton was shot to death in the bed located just where it was shown on the floorplan.

Within hours of the raid, Mitchell, after meeting with Johnson and Piper, went to Hanrahan's office, where he talked to Hanrahan, Jalovec and Groth, examined the seized weapons, discussed the raiders' story and talked to Jalovec about whether his connection to the raid should remain secret. Hampton II at 617 Mitchell subsequently buried the only copy of the floorplan in O'Neal's informant file, where only he, Piper and Johnson would have access. (Tr. 6927-9; 9291-2.) It was not until December 12, 1969, eight days after the raid, that Mitchell first mentioned in writing that O'Neal had informed him of the federally illegal shotguns. (PL 23) Hampton II at 617 And this memo, like the floorplan, was buried in O'Neal's file. (Tr. 7041) Hampton II at 617 Defendant Johnson was in charge of gathering evidence for the federal Grand Jury, and testified before it on Feb. 12, 1970. (Tr. 5334, 5197) Hampton II at 619. Johnson had participated in the pre-raid planning, and knew that defendants Mitchell, Piper and O'Neal were deeply involved in communications with Hanrahan's men concerning Hampton and the Panthers. Although he testified that he had been briefed for his appearance,* when asked by the Grand Jury to describe the FBI's role in the events, he failed to mention the floorplan, the allegedly federally illegal guns, or O'Neal's role as undercover agent; Hampton II at 619, and of course he never mentioned COINTELPRO. Neither Mitchell, Piper or O'Neal testified before the Grand Jury, and none of them came forward with any information concerning their role in the raid. Only a few days earlier, Bureau headquarters was informed by Chicago that Johnson's testimony would occasion"no fear of Bureau exposure." (PL 339) Further, Johnson was party to the highly secret deal between Jerris Leonard and Edward Hanrahan by which it was ensured that Hanrahan and his men would remain silent about the FBI's role. (PL 24)**

While the FBI defendants maintained their public coverup, they ratified and bragged about the results of the raid and their role in it, by internal memo. On December 11, 1969, Piper wrote the Bureau in Washington in Johnson's name, informing them that the floorplan and weapons information was "not available from any other source," that it "proved to be of tremendous value," and that the raid "was based on the information supplied by informant (O'Neal)." Piper and Johnson sought a bonus of $300 for O'Neal in the same memo, a request that the Bureau readily approved. At trial, Piper explained his actions by calling the raid--with two BPP members dead and four injured, as the memo states--a "success." (PL 83, Tr. 9529) On February 11, 1970, the very day Johnson

*The evidence also showed that the only other time that the defendants drew a floorplan was in June of 1969 when they used a floorplan of Panther headquarters obtained by O'Neal to aid them in an FBI raid of those premises. There was no evidence that they had ever conveyed a floorplan to state law enforcement officials or the County prosecutors office--on any other occasion than December 4, 1969.

**FBI documents revealed that the June FBI raid, led by defendant Johnson with the assistance of Mitchell and O'Neal, was also designed to disrupt the BPP under COINTELPRO. (Pl 20).

*Although Johnson testified at trial that he did not remember who briefed him, Piper recalled a conversation with Johnson just prior to his testimony during which they discussed his impending appearance. (Tr. 9135-44, 11419-20)

**The Court said on this subject that the "concerted effort to conceal facts is further evidenced by the obstruction of the Federal Grand Jury investigation..."Defendant Johnson's testimony could be found to be "false and misleading" with intent to "conceal the roles of Piper Mitchell and O'Neal in the raid," one which continued through the trial. Hampton II, at 628.

appeared before the Grand Jury, Mitchell wrote Bureau headquarters that O'Neal had "provided detailed floorplans of this apartment, identities of the occupants... (which) resulted in a quantity of weapons and ammunition being recovered and seven BPP members arrested." (PL #91, p6) Hampton II at 619.

During the pre-trial and trial of this case these defendants and their lawyers continued to cover up their role in the raid. They kept the O'Neal "bonus memo" secret throughtout the pre-trial on the false grounds that it and other related documents were irrelevant. They continued to conceal it during the first three months of the trial, despite a specific court order to produce all documents in O'Neal's files. Most of the documents which form plaintiffs' case against these defendants would still be secret if Mitchell had not inadvertantly revealed the withholding of files during his testimony. Hampton II at 639-41. The defendants' trial assistant, FBI agent Larry Deaton, later revealed that Piper himself had been in charge of reviewing the files and selecting documents for production in Court, and thus directly engineered the massive fraud --including concealment of his own bonus memo, which, perhaps more than any other, stands as the "smoking gun" with respect to the involvement of the FBI in this case. (Tr. 7225) Hampton II at 640. Mitchell likewise continued to hide the truth about the files after his blunder, by conducting a sham search for the missing document for another several days.* O'Neal personally attempted to intimidate two of plaintiffs' witnesses, former BPP members who were scheduled to testify about his illegal activities as a provocateur under COINTELPRO.

*Mitchell's blunder was to volunteer information in one of his answers which concerned an incident, highly derogatory to Hampton, which O'Neal had supposedly told him about, but which was not written about in any of the documents plaintiffs had received. Since he had testified that he wrote up everything O'Neal told him in memos, and that the memos were routed to O'Neal's file, the BPP file, and the files of each individual mentioned, a document reporting this incident should have been in both the O'Neal and Hampton files which had supposedly been produced. When the judge ordered him to check for the document, he began his search in the BPP file, at a point chronologically much later than the date of the alleged incident; and did not look in the Hampton or O'Neal files --since finding it there would have revealed that parts of those files had not been turned over. From day to day thereafter, for a week, he reported that he had not yet been able to locate the document; until, on the last day of his testimony, he finally brought it in. When it was detected that the document should have been included in the Hampton and O'Neal files, the whole deception unravelled, and the original files --perhaps fifty times as many documents as had previously been turned over, were brought into court. (Tr. 7040-4, 7085, 7525, etc.) Hampton II at 640.

It is in the teeth of all this evidence, much of it wilfully suppressed for many years, that the federal defendants tell this Court that their denials should be taken as a conclusive determination of the ultimate facts in the case. They claim they were only "exchang(ing) lawfully acquired information about actual or proposed criminal activities with local law enforcement agencies," and that they did not even know of, let alone help plan, the murderous raid. (Fed Pet p. 20) This was also their defense at trial, and it is wholly contradicted by their own documents, and their entire course of conduct, before and after the raid.

The evidence, as the Court of Appeals found, was more than sufficient to support the conclusion of a jury that these defendants worked with the state co-conspirators not for legitimate law enforcement purposes, but to "eliminate," as the Court of Appeals put it, the Black Panther Party. The Court correctly determined from the evidence that the "extensive series of communications" between the state and federal officers could lead the triers of fact to conclude that they had reached "an agreement --either tacit or express-- to act in concert to achieve this shared objective." Hampton II at 624. The Court further held that "plaintiffs' evidence indicates that the federal and state defendants shared in instigating and preparing for the raid," and that the communications between Jalovec and Mitchell, in particular, were essential to the planning and successful execution of the raid. Without the information the federal defendants furnished the state defendants, the state defendants could not have acted in furtherance of the purpose which plaintiffs contend the state and federal defendants shared --inflicting injury to the BPP." Ibid. It said the federal and state defendants, from the evidence, could be found to have performed "discreet functions in concert to further a common plan --the raid." Ibid.

When the evidence that Hampton was drugged, the obvious use of the weapons information as a pretext, the later ratification of the gross results of the raid, the unremitting attempts to cover up and suppress the evidence, the repeated departures from normal procedure, and the fraudulent character of the warrant itself are all added to the federal defendants' actions prior to the raid, their bald denials are put in resounding conflict, and demand determination by a jury.

It is therefore hard to imagine a case where the admonition that strict procedural controls must be used to limit unfounded Bivens claims, as articulated by Mr. Justice White in Butz, would have less applicability than here. The case is not only not frivolous, but "of paramount significance," in which plaintiffs have presented "serious evidence" of "gross federal and state misconduct," rebutted only by bald, self-serving denials from officers who have been substantially impeached. The issues going to the intent, motive and purpose of these defendants are singularly inappropriate for directed verdict, Adickes vs. Kress, since "(t)he existence or non-existence of a conspiracy is essentially a factual issue that the jury, not the trial judge, should decide." 398 U.S. at 176, Black, J., concurring. Given the strength of the conflicting evidence, and, in particular, the impeaching effect of these defendants' undeniable efforts to cover up, the need for the jury to weigh the credibility of the denials is absolute.

The federal defendants invoke this Court's rule in Butz, but, in reality, they are demanding absolute immunity, conditioned only by the requirement that they submit sworn denials of any wrongdoing. They couch their plea in the rhetoric of Law and Order, with dire warnings of the "chilling effect" if such denials are left subject to challenge, by way of a smokescreen to hide their deep implication in one of the most shocking examples of police violence in American history. As this Court has said, "It should hardly need stating that ordinarily, liability in damages for unconstitutional or otherwise illegal conduct has the very desirable effect of deterring such conduct." Imbler vs. Pachtman. No case could more cogently illustrate the wisdom of that rule.

It is not hard to understand why the FBI defendants would attempt to twist the rule of Butz so as to provide a pretext under which they could escape the consequences of a jury's consideration of the evidence against them, but their claim is transparently thin, palpably false, and "contrary to the course of decision in this Court from the early days of the Republic," Butz, 438 U.S. at 487. Without question, despite the heavy political influence they so urgently seek to bring to bear between the lines, their wholly groundless petition must be denied.

L. THE CIRCUIT COURT CORRECTLY FOLLOWED THE EXPRESS LEGISLATIVE INTENT AND "BROAD REMEDIAL PURPOSE" OF 42 U.S.C. 1988 IN AWARDING ATTORNEYS' FEES TO PLAINTIFFS ON APPEAL

The federal and state defendants ask this Court to review the Circuit Court's award of attorneys fees for work on the appeal of this case, claiming that the plaintiffs are not "prevailing parties" within the meaning of 42 U.S.C. 1988.* In its order setting the amount of the fee, the Court said:

> At the outset, we note that both the federal and state defendants contend that plaintiffs do not presently enjoy "prevailing party" status and thus are not entitled to attorneys' fees for appellate work. In Hampton II, we were not persuaded by this argument, nor are we convinced of its merits at this time. It is settled law that in order to be a prevailing party one need not win on each issue in the case. A party prevails if judgment is entered in his favor even though he did not sustain his entire claim. 10 Wright & Miller, Federal Practice & Procedure, #2664. The legislative history of the Act makes clear that Congress intended that plaintiffs who "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit" could be a "prevailing party" under the terms of the Act. Nadeau v. Helgemoe, 581 F.2d 275,278-79 (1st Cir. 1978).
>
> Hampton v. Hanrahan, ___F.2d___(order of 12/12/79 at para. 2; Attached as Appendix J)

The Court then went on to correctly characterize the extent to which the plaintiffs had prevailed on appeal:

> We believe plaintiffs have shown substantial success on the merits on appeal, including the reversal of the directed verdicts, the right to discover the alleged informant's identity, a hearing to determine what sanctions, if any, should be imposed against the federal defendants and their attorneys for suppressing documentary evidence, and consideration of plaintiffs' outstanding discovery demands on remand. Thus, plaintiffs are prevailing parties. We believe that any other construction of the Act would frustrate its basic rationale.
>
> Hampton II (order of 12/12/79 at p. 3)

The Circuit Court grounded its decision in the legislative history of the Act, which expressly establishes that, in their discretion, courts may

*The federal defendants claim the issue is "whether having determined only that directed verdicts should not have been entered in favor of petitioners, and that the case should therefore be remanded for a new trial, the Court of Appeals erred in awarding fees to respondents as "prevailing parties" under 42 U.S.C. 1988?" The state defendants ask "whether under 42 U.S.C. 1988 plaintiffs may be awarded Appellate Attorneys' fees while the question of liability and alleged civil rights violations are still pending in the trial court, there being as a consequence no "prevailing party" as required by 42 U.S.C. 1988? Does the Court of Appeals' ruling in this respect violate petitioners' right of due process under the Fifth Amendment as construed and applied? "(Point XI) And they argue that, "as construed and applied by the Court below 42 U.S.C. 1988 violated defendants' constitutional rights, is contrary to Congress' intent and conflicts with other circuits."

find a civil rights plaintiff to have prevailed before final judgment and award interim fees, in order to serve the broad remedial purposes of 42 U.S.C. 1988. As the House and Senate reports state:

> Furthermore, the word "prevailing" is not intended to require the entry of a final order before fees may be recovered. "A district court must have discretion to award fees and costs incident to the final disposition of interim matters." Bradley v. Richmond School Board, 416 U.S. 696,723 (1974); see also, Mills v. Electric Auto-Lite Co., 396 U.S. 375 (1970). Such awards--pendente lite--are particularly important in protracted litigation, where it is difficult to predicate with any certainty the date upon which a final order will be entered. While the courts have not yet formulated precise standards as to the appropriate circumstances under which such interim awards should be made, the Supreme Court has suggested some guidlines. "(T)he entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees..." Bradley v. Richmond Board, supra, at 722, n. 28. (H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 8.) (emphasis supplied)
>
> * * * *
>
> In appropriate circumstances, counsel fees under S. 2278 may be awarded pendente lite. See Bradley v. School Board of the City of Richmond, 416 U.S. 696 (1974). Such awards are especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues. See Bradley, supra,; Mills v. Electric Auto-Lite Co., 396 U.S. 375(1970). (S.Rep. No. 94-1011, 94th Cong. 2d. Sess. 5.) (emphasis supplied)

The Circuit Court's opinion on the merits of the Appeal, and the history of the case itself, clearly demonstrate that this is the very kind of case which was contemplated by the drafters of the Act. It is certainly "protracted litigation," having extended into its eleventh year, and the Court of Appeals' decision is "an important matter in the course of the litigation which has determined substantial rights of the parties." The decision has restored most of the defendants to the case, and guarantees that a jury must decide their fate. It has determined that the defendants obstructed justice, suppressed documents, and used dilatory tactics throughout the entire pretrial and trial of the case, and has ordered a hearing on sanctions for these tactics. The Court provides for full discovery--including the revelation of defendant Groth's purported informant--upon retrial, and directs re-assignment away from the hopelessly biased trial judge.

Several Courts have awarded attorneys fees on appeal although the decision did not finally determine the ultimate liability of the parties. The Ninth Circuit, in awarding attorneys' fees to a defendant who successfully defended

against an interlocutory appeal, held:

> The EEOC argues that 706(k) authorizes an award only to the prevailing party. Although Xerox "prevailed" on this interlocutory appeal, it still might lose the principal case, and thus not prevail. We agree that litigation may not be dissected to the point that the losing party be permitted to recover attorneys' fees connected with every procedural motion in which it prevails. But this interlocutory appeal is sufficiently significant and discrete to be treated as a separate unit . Thus the fact that Xerox prevailed on this appeal qualifies it as "prevailing party eligible for award of attorneys fees connected with the appeal." Xerox v. Van Hoomissen, 503 F.2d 1131 (9th Cir. 1974)*

Further, it is well accepted, contrary to defendants' assertions, that the plaintiff need not establish a violation of federal law or the Constitution before he/she can be determined to be a prevailing party under the act. See e.g. Gagne v. Maher, 594 F.2d 336 (2nd Cir. 1979), cert granted ___U.S.____, Davis v. Pastrick, 600 F.2d 70,78 (th Cir. 1979); Parker v. Matthews, 411 F.Supp. 1059, 1902-3 aff'd sub nom 561 F.2d 320 (D.C. Cir. 1977); Ross v. Horn, 598 F.2d 1312 (3rd Cir. 1979); Brown v. Culpepper, 599 F.2d 274,277 (5th Cir. 1977).

The defendants place much reliance upon several circuit cases which refused to find that a successful appellate plaintiff had prevailed within the meaning of the Act. In Grubbs v. Butz, 548 F.2d 973 (D.C. Cir. 1976), the Court, after noting that the legislative history of 42 U.S.C. 2000-5(k) unlike that of Sec.1988, made no mention of interim fees, found that a Title VII plaintiff, who had won reversal of the outright dismissal of her claim on statute of limitations grounds but had lost on the denial of a temporary restraining order, had not prevailed within the meaning of that Act. Similarly, in Bly v. Mcleod, 605 F.2d 134(4th Cir. 1979), a plaintiff who had won remand from the 4th Circuit on the issue of dismissal of his complaint, in order to determine the basis of the District Court's decision,** was refused

*See also Malone v. North American Rockwell Corp., 457 F.2d 779 (9th Cir. 1972); plaintiff found to prevail under 42 U.S.C. 2000- (k) for winning a reversal on summary judgment, cited with approval in Johnson v. Georgia Highway, 488 F.2d 714 (5th Cir. 1974), Chandler v. Roudebush, 13 EPD Para. 11,574 (C.D. Cal. 1977). See also, Bagby v. Beal, 606 F. 2d 411 (3rd Cir. 1979),(attorneys' fees awarded to plaintiff for obtaining due process hearing although hearing officer ultimately upheld suspension from job).

**At the trial level the plaintiff had won a temporary restraining order and the empanelling of a three Judge Court.

prevailing party status under 42 U.S.C. 1973(e) and 1988. In these cases, unlike the case at bar, the plaintiffs did not meet the contemplated standards. They were at the beginning of their litigation; the appellate decisions were clearly preliminary and procedural, and did not determine significant rights of the parties. Nor did those cases carry the compelling and longstanding social significance of the case at bar. In those cases the Courts were well within their discretion to deny prevailing party status, just as here, the Court was well within its discretion to find that the plaintiffs had sufficiently prevailed under the Act.

Several additional factors give further support to the Circuit Court's exercise of discretion in awarding fees here. In the present posture of the case, plaintiffs have "prevailed" on numerous significant issues at the trial level. We have survived a motion to dismiss, after taking an appeal to the Seventh Circuit, and successfully reversed the trial Court's entry of a severance order, after filing mandamus to the Seventh Circuit. We have fought for our evidence throughout the pretrial and trial stages, having ultimately obtained much of it despite unremitting "dilatory" and "obstructionist" tactics by the defendants. The content of many of these documents received wide public exposure upon entry into evidence at trial*, and they were instrumental in aiding the Senate Select Committee's findings. Further, the relief on appeal will have a significant effect on the ultimate determination of the issues. In particular, the Court's decisions concerning Groth's informant and the sanctions against the federal defendants may well lead to the conclusion of certain basic issues against the defendants--including the 4th Amendment claims. Further, defendants' pious assertions of "blamelessness" to the contrary notwithstanding, their obstructionism and concealment of evidence violated federal law, and, as the Circuit Court found, its effect was to deprive plaintiffs a fair trial--an actionable Due Process violation in and of itself,

*The "public education function" here served is analogous to that of a plaintiff who is considered a "prevailing party" under the Freedom of Information Act and is thereby entitled to fees. See: Campbell v. U.S. Civil Service Commission, 539 F.2d 58 (10th Cir. 1976); Blue v. Bureau of Prisons, 570 F. 2d 529 (5th Cir. 1978); Flower v. FBI, 448 F.Supp. 899 (N.D. Tex. 1978).

which fully supports the fee award.*

Moreover, the same obstructionism and misconduct forced plaintiffs to suffer through long, fruitless proceedings in the trial court, and were largely responsible for the massive appeal they were obliged to make to the Seventh Circuit; and the fee award only begins in some small measure to recompensate plaintiffs for that largely needless and redundant effort at a premature stage in the proceedings.

The state defendants also assert that their right of access to the Courts is inhibited by this ruling, and claim that the plaintiffs' attorneys are not acting in the public interest. As the Court's opinion below reflects, the events of and surrounding December 4th have been of great social significance and interest in Chicago as well as nationally, especially to black citizens. The opinion recognizes that major elements of both local and federal governments were either involved in the events themselves or in suppression of the truth after the fact. Those judicial, prosecutorial, and law enforcement officials, charged with enforcing the Constitution, broadly perverted and abdicated their responsibilities; and it has only been because of the efforts of plaintiffs' lawyers--working with only token compensation when there was any at all--that any real effort to bring the whole truth to the public has been accomplished. Also before the Court were public records which show that these same state defendants have had private counsel of their choice since the beginning, lawyers who have been paid over 1.6 million dollars in attorneys' fees, and costs, while the federal government has expended over $500,000 in defense of the four federal defendants since 1974. These funds are limitless. They serve to encourage and underwrite endless obstructionism and likewise insure that any possibility of settlement remains contrary to the financial interests of the defendants' lawyers. Recognizing the meaning of such complete public sponsorship of the defense, the Circuit Court directed that the

*Additionally these findings of violations of the Constitution and Federal Law will hopefully have a deterent effect on these defendants and persuade them to conform their actions to Federal and Constitutional norms on the retrial, a result which independently supports a fee award. See Fogg v. New England Tel. & Tel. Co., 346 F.Supp. 645 (D.N.H., 1972) (fees granted although plaintiff lost because defendant conformed practices to hire more women); Parham v. Southwestern Bell Telephone, 433 F. 2d 421 (8th Cir. 1970); Bolton v. Murray Envelope, 553 F. 2d 881 at 884 (2d Cir. 1977); Mid-Hudson Legal Services v. G & U, Inc., 578 F. 2d 34 (5th Cir. 1978).

fee awards be charged to the defendants in their official capacities, ordering the very modest sum of approximately $73,000 for the undersigned, and some $27,000 for counsel for the remaining plaintiffs.* Hampton II, 12/12/79 order at p. 2 . In this light, the defendants' arguments about inhibited "access to the Courts" are both unbearably arrogant and legally and factually absurd.

It is hard to imagine a more appropriate case for an award of interim fees. As the legislative history clearly states, the Civil Rights Act "depends heavily on private enforcement," and fee awards are an "essential remedy" because the aggrieved plaintiff often has "little or no money." (S. 2278, p.2) Further, the legislative history states:

> The remedy of attorneys' fees has always been recognized as particularly important in the civil rights area, and civil rights and attorneys' fees have always been closely interwoven. In the civil rights area Congress has instructed the Courts to use the broadest and most effective remedies available to achieve the goals of the civil rights laws. S. 2278, p. 3 See also Hutto v. Finney 437 U.S. 678 (1978).

If the discretion to award interim fees in circumstances like these is denied or curtailed, civil rights plaintiffs in complex cases will surely have little chance for vindication remaining to them. If defendant officials are endlessly sponsored with public funds, and may take advantage of such support to delay and obstruct the proceedings against them until the plaintiffs are exhausted and must give up, Constitutional guarantees will be robbed of meaning; and it would make more sense to repeal the act, and save all that money. Unless the Court is prepared to go to this length, the petitions on this issue must be denied.

---

*The undersigned requested compensation for 3650 hours at a rough average of $75 per hour for a total of $288,000, and requested a multiplier. Mr. Montgomery sought an additional $100,000 for approximately 1800 hours at $75.00 per hour. The Court compensated the undersigned for approximately one-half their total hours, at $40 per hour, while compensating Mr. Montgomery at the same rate for approximately one-fourth of the hours he claimed. In contrast the state defendants alone received over $300,000 in fees for over 6800 billed hours of work for losing the appeal; their charges were personally approved by the District Court.

V. CONCLUSION

After ten years, it is as difficult to find fresh words and new energy with which to plead this case as it is demoralizing to face the reality that, with the weight of three governments behind them, and an Establishment very self-servingly dubious about the underlying facts looking on, the defendants have been able to thoroughly frustrate the normal processes of litigation, and effectively nullify the promise of equal justice which is supposedly the foundation of our Law.

It is not difficult to perceive why the defendants and their government patrons would shrink from the prospect that the truth in this case would be brought to a fair hearing, or why the leaders of government over this decade --from one County Board, one Mayor, one Attorney General and one Administration to the next-- would so readily fall in with the continuing conspiracy of cover-up and resistance to judgment. When reasonable, impartial citizens, lawfully constituted as a jury, hear this evidence, and respond in conscience to these facts: these bullet holes and trajectories, this floorplan, these FBI documents; all of this guilty behavior, and these palpable lies --such a verdict must be awesome and frightening to the Establishment, when the evil side of its nature stands so starkly revealed.

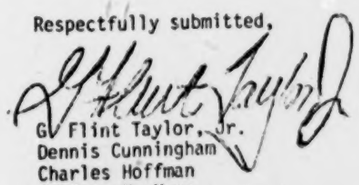
The assassination of Fred Hampton, like the shocking, frightening, and still unredressed constitutional treason of COINTELPRO which brought it about, is a pure embodiment of that which the Bill of Rights was created to guard against. After ten years, the case it gave rise to has become a commensurate perversion of the Administration of Justice. It is not an accident, but a conspiracy of power which has prevented the killers of Fred Hampton and Mark Clark from being brought to account for their acts in a Court of Law. The Bill of Rights was intended as a system of restriction on power, and the Civil Rights Act as a remedy for its abuse. Government, the Courts, the Establishment, have tolerated the abrogation of both in this case for ten years; until the conscience of the Court of Appeals was applied to uphold the validity of the plaintiffs' claims and evidence, and

their right to have them fairly heard.

The instant petitions represent the last best hope of the defendants to succeed with legitimated murder, and with the continuing conspiracy by which they have managed to evade judgment. The claims and issues they have formulated for certiorari are 'transparently thin, palpably false,' and totally beneath the notice of this Court under all the applicable rules. Yet the underlying plea they bring to this Court is momentous: join the conspiracy, suppress the truth, protect the police no matter what they do; and let the Bill of Rights abate.

Such is the real substance of what they demand, and expect, with their claims for immunity and other forms of protection from a fair adjudication of the claims against them. If the true insterests of the Establishment, the Administration of Justice, and the People --as expressed in the Bill of Rights-- are to be upheld, such demands must be firmly rejected, and certiorari must be denied.

Respectfully submitted,



G. Flint Taylor, Jr.
Dennis Cunningham
Charles Hoffman
Jeffrey H. Haas
Jonathan Moore

Attorneys for Plaintiff-Respondents
ANDERSON, BELL, CLARK, SATCHEL and TRUELUCK.

343 S. Dearborn St. -Rm 1607
Chicago, Illinois 60604
(312) 663-5046

Of Counsel:
Herbert O. Reid
Howard University Law School
Washington D. C.

Nathaniel Jones
James Meyerson
N.A.A.C.P.
1790 Broadway
New York, N. Y.

Respondents gratefully acknowledge the assistance of Janie Hauft, Al Burgener, Ferd Eggan, Shel Bannister, Patricia Handlin, Peter Schmiedel, and Alarie Mack in the preparation of this Brief.